No. 14-1209

Title:	John Sturgeon, Petitioner v. Bert Frost, in His Official Capacity as Alaska Regional Director of the National Park Service, et al.
Docketed:	April 3, 2015
Linked with 14A862	
Lower Ct:	United States Court of Appeals for the Ninth Circuit
Case Nos.:	(13-36165)
Decision Date:	October 6, 2014
Rehearing Denied:	December 16, 2014

QuestionsPresented

—Date—	——Proceedings and Orders----------
Feb 18 2015	Application (14A862) to extend the time to file a petition for a writ of certiorari from March 16, 2015 to April 30, 2015, submitted to Justice Kennedy.
Feb 20 2015	Application (14A862) granted by Justice Kennedy extending the time to file until March 31, 2015.
Mar 31 2015	Petition for a writ of certiorari filed. (Response due May 4, 2015)
Apr 6 2015	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received form counsel for petitioner.
Apr 29 2015	Brief amici curiae of Ahtna Incorporated, et al. filed.
Apr 30 2015	Order extending time to file response to petition to and including June 3, 2015.
May 4 2015	Brief amicus curiae of Artic Slope Regional Corporation
May 4 2015	Brief amicus curiae of Safari Club International filed.
May 4 2015	Brief amicus curiae of Alaska filed.
Jun 3 2015	Order further extending time to file response to petition to and including July 6, 2015.
Jul 1 2015	Order further extending time to file response to petition to and including August 5, 2015.
Aug 5 2015	Brief of respondents Sue Masica, in Her Official Capacity as Alaska Regional Director of the National Park Service, et al. in opposition filed.
Aug 19 2015	DISTRIBUTED for Conference of September 28, 2015.
Aug 21 2015	Reply of petitioner John Sturgeon filed. (Distributed) Oct 1 2015 Petition GRANTED.
Oct 22 2015	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the petitioner.
Nov 13 2015	Motion to dispense with printing the joint appendix filed by petitioner John Sturgeon.
Nov 16 2015	Brief of petitioner John Sturgeon filed.
Nov 20 2015	Brief amicus curiae of Pacific Legal Foundation filed.
Nov 20 2015	Motion of Alaska for leave to participate in oral argument as amicus curiae and for

	divided argument filed.
Nov 23 2015	Brief amici curiae of United States Senators Sullivan and Murkowski, and Representative Young filed.
Nov 23 2015	Brief amici curiae of Doyon, et al. filed.
Nov 23 2015	Brief amicus curiae of Safari Club international filed.
Nov 23 2015	Brief amicus curiae of Southeastern Legal Foundation filed.
Nov 23 2015	Brief amicus curiae of Alaska filed.
Nov 23 2015	Brief amici curiae of Arctic Slope Regional Corporation, et al. filed.
Nov 23 2015	Brief amici curiae of Alaska Miners Association, Inc., et al. filed.
Nov 24 2015	SET FOR ARGUMENT on Wednesday, January 20, 2016
Dec 4 2015	Record requested from U.S.C.A. 9th Circuit.
Dec 14 2015	Motion to dispense with printing the joint appendix filed by petitioner GRANTED.
Dec 14 2015	Motion of Alaska for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Dec 15 2015	CIRCULATED.
Dec 15 2015	Record received from the U.S.D.C. Dist. of Alaska. 1 Envelope.
Dec 16 2015	Brief of respondents Bert Frost, in His Official Capacity as Alaska Regional Director of the National Park Service, et al. filed. (Distributed)
Dec 23 2015	Brief amici curiae of National Parks Conservation Association, et al. filed. (Distributed)
Dec 23 2015	Brief amici curiae of Alaska Native Subsistence Users filed. (Distributed)
Jan 13 2016	Reply of petitioner John Sturgeon filed. (Distributed)
Jan 20 2016	Argued. For petitioner: Matthew T. Findley, Anchorage, Alaska; and Ruth Botstein, Assistant Attorney General, Anchorage, Alaska (for Alaska, as amicus curiae). For respondents: Rachel P. Kovner, Assistant to the Solicitor General, Department of Justice, Washington, D. C.
Mar 22 2016	Judgment VACATED and case REMANDED. Roberts, C. J., delivered the opinion for a unanimous Court.
Apr 25 2016	JUDGMENT ISSUED

No. 14-1209

IN THE

Supreme Court of the United States

JOHN STURGEON,

Petitioner,

v.

SUE MASICA, IN HER OFFICIAL CAPACITY AS ALASKA REGIONAL DIRECTOR OF THE NATIONAL PARK SERVICE *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Section 103(c) of the Alaska National Interest Lands Conservation Act of 1980 prohibits the National Park Service from exercising regulatory control over State, Native Corporation, and private Alaska land physically located within the boundaries of the National Park System.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner in this case is John Sturgeon.

Respondents are Sue Masica, in her official capacity as Alaska Regional Director of the National Park Service; Greg Dudgeon; Andee Sears; Sally Jewell, Secretary of the Interior; Jonathan Jarvis, in his official capacity as Director of the National Park Service; the National Park Service; and the United States Department of the Interior.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT ii

TABLE OF CONTENTS..... iii

TABLE OF APPENDICES v

TABLE OF CITED AUTHORITIES vi

PETITION FOR A WRIT OF CERTIORARI..... 1

OPINIONS BELOW..... 1

JURISDICTION..... 1

STATUTORY PROVISION INVOLVED 1

INTRODUCTION..... 2

STATEMENT OF THE CASE 4

A. The State of Alaska's Land Allocation 4

B. The Alaska National Interest Lands Conservation Act of 1980 7

C. ANILCA's Regulatory History..... 11

D. Factual Background 14

Table of Contents

Page

E. Proceedings Below 17

REASONS FOR GRANTING THE PETITION.....18

I. The Petition Raises A Question of Exceptional Importance To The State of Alaska, Native Corporations, and Private Citizens.....19

II. The Ninth Circuit's Interpretation of Section 103(c) of ANILCA Is Unsustainable Under This Court's Decisions 23

CONCLUSION 31

TABLE OF APPENDICES

Page

APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED DECEMBER 16, 2014 ..... 1a

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED OCTOBER 6, 2014 ..... 3a

APPENDIX C — DECISION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA, FILED OCTOBER 30, 2013 ..... 35a

TABLE OF CITED AUTHORITIES

Page

Cases

Alaska v. United States,
201 F.3d 1154 (9th Cir. 2000).....15

Bond v. United States,
131 S. Ct. 2355 (2011).....20, 22

Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.,
467 U.S. 837 (1984).....24

Chugach Natives v. Doyon, Ltd.,
588 F.2d 723 (9th Cir. 1979) 6

City of Angoon v. Marsh,
749 F.2d 1413 (9th Cir. 1984).....7, 19

City of Arlington, Tex. v. FCC,
133 S. Ct. 1863 (2013).....23

City of Saint Paul, Alaska v. Evans,
344 F.3d 1029 (9th Cir. 2003) 6

Coeur Alaska, Inc. v. Se. Alaska Conservation Council,
557 U.S. 261 (2009)..... 19

Deal v. United States,
508 U.S. 129 (1993).....27

Cited Authorities

Page

John v. United States,
720 F.3d 1214 (9th Cir. 2013) 20

K Mart Corp. v. Cartier, Inc.,
486 U.S. 281 (1988) 25

Koniag, Inc. v. Koncor Forest Resource,
39 F.3d 991 (9th Cir. 1994) 20

Maracich v. Spears,
133 S. Ct. 2191 (2013) 30

Montana v. United States,
450 U.S. 544 (1981) 20

Nat'l Fed'n of Indep. Bus. v. Sebelius,
132 S. Ct. 2566 (2012) 22

Paroline v. United States,
134 S. Ct. 1710 (2014) 29

State of Minnesota by Alexander v. Block,
660 F.2d 1240 (8th Cir. 1981) 21

Trustees for Alaska v. State,
736 P.2d 324 (Alaska 1987) 19

United States v. Lindsey,
595 F.2d 5 (9th Cir. 1979) 21, 22

Cited Authorities

Page

Statutes and Other Authorities

16 U.S.C. § 1a-2(h) 18, 27

16 U.S.C. §§ 431-433 6

16 U.S.C. § 3101 ..... *passim*

16 U.S.C. § 3101(b)-(c) 7

16 U.S.C. § 3101(d) 7, 25

16 U.S.C. § 3102(1) 9

16 U.S.C. § 3102(2) 9

16 U.S.C. § 3102(3) 9, 24

16 U.S.C. § 3102(4) 8

16 U.S.C. § 3103(c) 2, 8, 24, 27

28 U.S.C. § 1254(a) 1

43 U.S.C. § 1311(a) 15

43 U.S.C. § 1601(a) 5, 6, 19, 20

43 U.S.C. § 1601(b) 20

Cited Authorities

Page

43 U.S.C. § 1607 6

43 U.S.C. § 1616(d)(2) 6

43 U.S.C. §§ 1701-1784 6

54 U.S.C. § 100751 18

36 C.F.R. § 1.2(a)(3) 14, 17

36 C.F.R. § 1.2(b) 12, 13, 14

36 C.F.R. § 1.4 13

36 C.F.R. § 2.17(e) 14, 17

36 C.F.R. § 13.25 29

36 C.F.R. § 13.30 29

36 C.F.R. § 13.45 29

36 C.F.R. § 13.182 29

36 C.F.R. Part 13 12

43 Fed. Reg. 57009 (1978) 6

43 Fed. Reg. 59756 (1978) 6

Cited Authorities

Page

45 Fed. Reg. 9562 (1980).....6

46 Fed. Reg. 31836.....12

46 Fed. Reg. 31843.....12, 26

48 Fed. Reg. 30252 13

48 Fed. Reg. 30261 13

52 Fed. Reg. 35238 .....14, 16

61 Fed. Reg. 35133.....14

125 Cong. Rec. H3240.....9, 26

125 Cong. Rec. 9905 10

126 Cong. Rec. 21882.....11

126 Cong. Rec. 30495 11

Alaska Statehood Act, Pub. L. No. 85-508,
72 Stat. 339 (1958) 5, 15

H. Cong. Res. 452, 96th Cong.....11

Proclamation No. 4611 6

Pub. L. 113-287, Dec. 19, 2014, 128 Stat. 3272.....18

Cited Authorities

Page

Public Land Order 5653 6

Public Land Orders 5696-5711 6

S. Rep. 96-413 .....9, 25, 29

PETITION FOR A WRIT OF CERTIORARI

Petitioner John Sturgeon submits this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 768 F.3d 1066 and is reproduced in the Appendix ("App.") at 3a-34a. The Ninth Circuit's order denying rehearing en banc is unreported and is reproduced at App. 1a-2a. The opinion of the United States District Court for the District of Alaska is unreported and is reproduced at App. 35a-58a.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit rendered its decision on October 6, 2014. App. 5a. A timely petition for rehearing en banc was denied on December 16, 2014. App.1a. On February 20, 2015, Justice Kennedy extended the time to file this petition for writ of certiorari to March 31, 2015. This Court has jurisdiction under 28 U.S.C. § 1254(a).

STATUTORY PROVISION INVOLVED

Section 103(c) of the Alaska National Interest Lands Conservation Act of 1980 provides:

> Only those lands within the boundaries of any conservation system unit which are public lands (as such term is defined in this Act)

> shall be deemed to be included as a portion of such unit. No lands which, before, on, or after December 2, 1980, are conveyed to the State, to any Native Corporation, or to any private party shall be subject to the regulations applicable solely to public lands within such units. If the State, a Native Corporation, or other owner desires to convey any such lands, the Secretary may acquire such lands in accordance with applicable law (including this Act), and any such lands shall become part of the unit, and be administered accordingly.

16 U.S.C. § 3103(c).

INTRODUCTION

The State of Alaska contains over 150 million acres of federally managed national parks, preserves, and monuments. The act responsible for creating the majority of this parkland, the Alaska National Interest Lands Conservation Act ("ANILCA"), 16 U.S.C. § 3101 *et seq.*, carefully and explicitly provided that non-federal land and water physically located within these parks that is owned by the State of Alaska, Alaska Native Corporations, and private citizens would not be included within the National Park System and, as a result, would not be subject to the myriad federal rules and regulations enacted to manage the National Park System.

In 1996, however, the National Park Service ("NPS") abandoned its longstanding interpretation of ANILCA and declared that it had all along possessed full regulatory authority over non-federal land and waters within national

parks and preserves in Alaska. It was that about-face that led to this case. NPS bans hovercraft in all national parks, and that regulation has been extended to state navigable waters within the Yukon-Charley Preserve based on this revised interpretation of ANILCA. While operating a small personal hovercraft on the Nation River to access moose hunting grounds upriver from the Yukon-Charley, Mr. Sturgeon was informed by armed NPS officials (and again later by their regional supervisor) that he would be subject to federal criminal citation if he continued to use his state-licensed hovercraft within the Yukon-Charley Preserve. Mr. Sturgeon thereafter filed this suit in federal district court challenging NPS's interpretation of Section 103(c) of ANILCA, and its extension of the hovercraft ban to non-federal land, under the Administrative Procedure Act. The district court granted summary judgment to NPS and the Ninth Circuit affirmed.

The decision below warrants this Court's review. The Ninth Circuit has granted NPS plenary authority to regulate State, Native Corporation, and private lands within Alaska's national parks and preserves as though these lands were in fact part of these parks. That decision has significant social and economic ramifications that will reverberate throughout the State of Alaska. Not only does it deprive petitioner of a liberty interest and the State of Alaska of sovereign control over its land, it destroys rights granted to Alaska Natives under the Alaska Native Claims Settlement Act ("ANCSA"). Alaska Natives depend on this land for economic support, which will be denied to them by NPS regulations that destroy its economic value and deny to these landowners the right to make productive use of their property. In one fell swoop, then, the Ninth Circuit has nullified not one—but *two*—important federal

statutes over which it has exclusive review and in turn opened 19 million acres of non-federal Alaska land to invasive federal regulation.

The Ninth Circuit's decision also is unsustainable on the merits. Section 103(c) unambiguously provides that NPS may exercise regulatory control only over "public lands" in Alaska, which the law defines to exclude State, Native Corporation, and private lands (even if the non-public land is located within the physical boundaries of the National Park System). The Ninth Circuit's decision read this limitation on NPS authority out of existence, holding that Section 103(c) protects non-public Alaska land only from application of Alaska-specific NPS regulations (as opposed to nationwide regulations like the hovercraft rule). But not only does this interpretation betray the statute's text, structure, and history, it is utterly illogical as it denies to these non-public lands the benefit of Alaska-specific NPS regulations that relax nationwide restrictions on hunting, camping, and motorized access. A Ninth Circuit opinion interpreting a statute designed to insulate millions of acres of non-federal Alaskan wilderness from NPS management to somehow impose a more restrictive regulatory regime on this land than NPS imposes even on Alaska national park land warrants this Court's attention. The petition should be granted.

STATEMENT OF THE CASE

A. The State of Alaska's Land Allocation

The State of Alaska covers 570,374 square miles, or roughly one-fifth of the total land area of the contiguous United States. From north to south, Alaska measures

1,420 miles, approximately the distance between Denver, Colorado and Mexico City, Mexico, and from east to west it measures nearly 2,400 miles, approximately the distance from Savannah, Georgia to Santa Barbara, California. While Alaska is the largest of the fifty states, it supports a total population of only 710,231 people and most of its acreage is inaccessible by road. Indeed, Alaska's average population density is only 1.2 persons per square mile. If Manhattan had the same population density as the state of Alaska, 28 people would live there. Allocating land and resources in this vast landscape, and ensuring the economic viability of its people, has been an issue of vital importance since Alaska joined the Union in 1959.

Allowing the new State of Alaska to control its land and resources was a central compact of statehood. In the Alaska Statehood Act, Congress granted approximately 103,350,000 acres of land to the new State of Alaska (or 28 percent of its overall area), and required that any further conveyance of this land must reserve mineral and other rights to the State. *See* Alaska Statehood Act, Pub. L. 85-508, 72 Stat. 339. The purpose of this grant was to ensure Alaska's economic viability.

However, statehood did not resolve Native Alaskan land claims. In 1971, Congress passed the Alaska Native Claims Settlement Act ("ANCSA") in response to the "immediate need for a fair and just settlement of all claims by Natives and Native groups of Alaska, based on aboriginal land claims[.]" 43 U.S.C. § 1601(a). ANCSA created 13 Regional Corporations and 220 Village Corporations, and prescribed a three-step regime involving the withdrawal, selection, and conveyance of roughly 22 million acres of federal land within the State

of Alaska. ANCSA conveyed the land to the Village Corporations and patented the subsurface estate to Regional Corporations. The Regional Corporations also received the right to select an additional 16 million acres (of both surface and subsurface estates) from federal land. *See Chugach Natives v. Doyon, Ltd.*, 588 F.2d 723, 724 (9th Cir. 1979). Congress intended for the Native Corporations to use the transfers of lands and assets for economic development benefiting the Native peoples of Alaska. *See* 43 U.S.C. § 1607; *City of Saint Paul, Alaska v. Evans*, 344 F.3d 1029, 1031 (9th Cir. 2003).

ANCSA also addressed land allocation between the State of Alaska and the United States. Under ANCSA, the Secretary of Interior was directed to withdraw up to 80 million acres of federal land from availability for Native Corporation selection to protect national interest lands for "public use and enjoyment." 43 U.S.C. § 1616(d)(2). This process was never completed because the Secretary's withdrawals never received Congressional approval.[1] The Carter Administration later stepped in and ordered a series of land withdrawals, claiming authority under the Federal Land Policy and Management Act of 1976 ("FLPMA"), 43 U.S.C. §§ 1701-1784, and the Antiquities Act of 1906, 16 U.S.C. §§ 431-433. By 1980, the Executive Branch had withdrawn over 100 million acres of federal land. *See* Proclamation No. 4611, 43 Fed. Reg. 57009 (1978) (Admiralty Island National Monument); Public Land Order 5653, 43 Fed. Reg. 59756 (1978); Public Land Orders 5696-5711, 45 Fed. Reg. 9562 (1980).

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1. ANCSA provided that Congress had five years to act on the Secretary's recommendations and without Congressional action, the withdrawals would expire. 43 U.S.C. § 1616(d)(2)(D).

B. The Alaska National Interest Lands Conservation Act of 1980

The Alaska National Interest Lands Conservation Act of 1980 ("ANILCA") was a direct legislative response to the Executive Branch's unilateral withdrawal of millions of acres of federal lands for conservation purposes. "Congress became aware of the need for a legislative means of maintaining the proper balance between the designation of national conservation areas and the necessary disposition of public lands for more intensive private use." *City of Angoon v. Marsh*, 749 F.2d 1413, 1415-16 (9th Cir. 1984). The congressional goal, in other words, was "to preserve unrivaled scenic and geological values associated with natural landscapes" and "to provide the opportunity for rural residents engaged in a subsistence way of life to continue to do so." 16 U.S.C. § 3101(b)-(c). Congress thus designed ANILCA to provide "sufficient protection for the national interest in the scenic, natural, cultural and environmental values on the public lands in Alaska, and at the same time provide[] adequate opportunity for satisfaction of the economic and social needs of the State of Alaska and its people." *Id.* § 3101(d).

ANILCA affected 104.3 million acres of land in Alaska; the statute expanded the national park system in Alaska by over 43 million acres, creating ten new national parks, and increased the territory of three existing parks. Congress designated this land as the "conservation system unit" or "CSU."[2] As part of this national park expansion,

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2. "The term 'conservation system unit' means any unit in Alaska of the National Park System, National Wildlife Refuge System, National Wild and Scenic Rivers Systems, National Trails System, National Wilderness Preservation System, or a National

ANILCA established the Yukon-Charley Preserve as a CSU in east-central Alaska, west of the village of Eagle. *See id.* § 410hh(10).

Essential to ANILCA's compromise was Congress's assurance that the millions of acres of land previously set aside for the economic and social needs of the Alaskan people would not be subject to federal regulatory control and management. This concern was quite real given that much of this land surrounded or was located within the physical boundaries of CSUs.

Section 103(c) of ANILCA addressed the concern:

> Only those lands within the boundaries of any conservation system unit which are public lands (as such term is defined in this Act) shall be deemed to be included as a portion of such unit. No lands which, before, on, or after December 2, 1980, are conveyed to the State, to any Native Corporation, or to any private party shall be subject to the regulations applicable solely to public lands within such units. If the State, a Native Corporation, or other owner desires to convey any such lands, the Secretary may acquire such lands in accordance with applicable law (including this Act), and any such lands shall become part of the unit, and be administered accordingly.

16 U.S.C. § 3103(c).

Forest Monument including existing units, units established, designated, or expanded by or under the provisions of this Act, additions to such units, and any such unit established, designated, or expanded hereafter." 16 U.S.C. § 3102(4).

"The term 'land' means lands, waters, and interests therein." *Id.* § 3102(1). "The term 'Federal land' means lands the title to which is in the United States after December 2, 1980." *Id.* § 3102(2). "The term 'public lands' means land situated in Alaska which, after December 2, 1980, are Federal lands, except—(A) land selections of the State of Alaska which have been tentatively approved or validly selected under the Alaska Statehood Act and lands which have been confirmed to, validly selected by, or granted to the Territory of Alaska or the State under any other provision of Federal law; (B) land selections of a Native Corporation made under the Alaska Native Claims Settlement Act which have not been conveyed to a Native Corporation, unless any such selection is determined to be invalid or is relinquished; and (C) lands referred to in section 19(b) of the Alaska Native Claims Settlement Act." *Id.* § 3102(3).

Section 103(c)'s purpose was apparent from the inception of the legislative process. The provision began as an amendment "to make clear beyond any doubt that any State, Native, or private lands, which may lie within the outer boundaries of the conservation system unit are not parts of that unit and are not subject to regulations which are applied to public lands, which, in fact, are part of the unit." 125 Cong. Rec. H3240 (May 15, 1979). The Senate Report explained that "[t]hose private lands, and those public lands owned by the State of Alaska ... are not to be construed as subject to the management regulations which may be adopted to manage and administer any national conservation system unit which is adjacent to, or surrounds, the private or non-Federal public lands." S. Rep. No. 96-413 at 303 (November 14, 1979).

Arizona Congressman Morris Udall, ANILCA's primary sponsor in the House of Representatives, further explained that:

> this bill... is a direct out-growth of the Alaska Native Claims Settlement Act of 1971.... Thus, it is important to recall the relationship between the conservation system units ... and the lands which the Native peoples of Alaska have received and will receive pursuant to the Alaska Native Claims Settlement Act in return for the extinguishment of their claims based on aboriginal title. We recognize that there are certain lands which have been selected by Native Corporations and which are within the exterior boundaries of some of the conservation system units .... I want to make clear that inclusion of these Native lands within the boundaries of conservation system units is not intended to affect any rights which the Corporations may have under this act, the Alaska Native Claims Settlement Act, or any other law, or to restrict use of such lands by the owning Corporations nor to subject the Native lands to regulations applicable to the public lands within the specific conservation system unit.

125 Cong. Rec. 9905 (May 4, 1979).

Senator Ted Stevens of Alaska agreed:

> The fact that Native lands lie within the boundaries of conservation system units is not intended to affect any rights which the

> corporations have under this act, the Alaska Native Claims Settlement Act, or any other law. It is not our intent, by the inclusion of Native lands within the exterior boundaries of conservation system units, to imply that such inclusion is a revocation of land selections validly filed pursuant to any provision of the Alaska Native Claims Settlement Act. The Native organizations have been given repeated assurances that including their lands within conservation units will not affect the implementation of the Native Claims Settlement Act. We intend to have these assurances translated into practice by the administrative agencies.

126 Cong. Rec. 21882 (1980).

Section 103(c) was added to the final version of ANILCA through a concurrent resolution. *See* H. Cong. Res. 452, 96th Cong. (Nov. 21, 1980). The resolution, which contained Section 103(c)'s text, was added to the statute in order to firmly establish "that only public lands (and not State or private lands) are to be subject to the conservation unit regulations applying to public lands." 126 Cong. Rec. 30495, 30496 (1980).

C. ANILCA's Regulatory History

For sixteen years following ANILCA's enactment, NPS interpreted Section 103(c) to deny it the authority to regulate State of Alaska, Native Corporation, and private lands within the physical boundaries of CSUs as if they are part of the National Park System. In 1981, NPS

issued regulations to "provide interim guidance on public uses of National Park System units in Alaska, including units established by the Alaska National Interest Lands Conservation Act." 46 Fed. Reg. 31836 (June 17, 1981). The section-by-section preamble explained that:

> Sections 103(c) and 906(o) of ANILCA generally restrict the applicability of National Park Service regulations to federally-owned lands within park area boundaries. Consistent with the statute and the explanatory legislative history ... § 13.2(e) restricts the applicability of these regulations to 'federally owned' lands (defined to mean all land interests held by the Federal government including unconveyed Native selections) within park boundaries .... These regulations would not apply to activities occurring on State lands. Similarly, these regulations would not apply to activities occurring on Native or any other non-federally owned land interests located within park area boundaries.

Id. at 31843. NPS further explained that the Alaska-specific regulations found in 36 C.F.R. Part 13 "would not apply to activities occurring on Native or any other non-federally owned land interests located inside park area boundaries." *Id.*

As promulgated in 1983, then, 36 C.F.R. § 1.2(b) provided that:

> The regulations contained in Parts 1 through 7 of this chapter are not applicable on privately

> owned lands and waters (including Indian lands and waters owned individually or tribally) within the boundaries of a park area, except as may be provided by regulations relating specifically to privately owned lands and waters under the legislative jurisdiction of the United States.

48 Fed. Reg. 30252 (June 30, 1983).

36 C.F.R. § 1.4 defined "legislative jurisdiction" to mean "lands and waters under the exclusive or concurrent jurisdiction of the United States." NPS further explained that the regulation was "intended to also include state inholdings that are under the legislative jurisdiction of the United States." 48 Fed. Reg. at 30261.

Confusion nonetheless persisted as to the regulatory status of State-owned lands and the meaning of the phrase "legislative jurisdiction of the United States." In 1987, NPS resolved the confusion by revising Section 1.2(b). As revised, the regulation provided:

> Except for regulations containing provisions that are specifically applicable, regardless of land ownership, on lands and waters within a park area that are under the legislative jurisdiction of the United States, the regulations contained in Parts 1 through 5 and Part 7 of this chapter do not apply on non-federally owned lands and waters or on Indian lands and waters owned individually or tribally within the boundaries of a park area.

52 Fed. Reg. 35238 (Sept. 18, 1987). NPS cleared up the issue as to State-owned lands by broadening Section 1.2 to cover all "non-federally owned lands and waters or on Indian lands and waters." As to the meaning of "the legislative jurisdiction of the United States," NPS clarified that "when applied to non-federal lands, [it] means lands and waters over which the State has ceded some or all of its legislative authority to the United States." 52 Fed. Reg. 35238 (Sept. 17, 1987).

NPS reversed course in 1996, extending all of its regulations to non-federal lands in Alaska. To accomplish this objective, NPS issued 36 C.F.R. § 1.2(a)(3), which provides that NPS regulations apply to "[w]aters subject to the jurisdiction of the United States located within the boundaries of the National Park System, including navigable waters ... *without regard to the ownership of submerged lands, tidelands, or lowlands.*" 61 Fed. Reg. 35133 (July 5, 1996) (emphasis added). NPS revised 36 C.F.R. § 1.2(b) to provide that the "regulations contained in parts 1 through 5, part 7, and part 13 of this chapter do not apply on non-federally owned lands and waters or Indian tribal trust lands located within National Park System boundaries, *except as provided in paragraph (a) or in regulations specifically written to be applicable on such lands and waters.*" *Id.* (emphasis added). Among the NPS regulations made applicable to State-owned lands is 36 C.F.R. § 2.17(e), which bans the use of hovercraft within NPS boundaries.

D. Factual Background

John Sturgeon has held a resident hunting license in Alaska for the past 40 years and, from 1971 until this

controversy, annually hunted moose on the Yukon River downstream from Eagle, Alaska, and its tributary, the Nation River. App. 8a. The Nation River has been adjudicated to be navigable. *See Alaska v. United States*, 201 F.3d 1154 (9th Cir. 2000). Thus, title to the bed of the Nation River vested in Alaska under the Statehood Act, Pub. L. No. 85-508, 72 Stat. 339 (1958); accordingly, its waters and submerged lands are not "public land" for purposes of ANILCA. App. 55a. Further, the Submerged Lands Act of 1953 grants the State of Alaska the authority to manage, use, and administer these submerged lands, the natural resources in them, and the navigable waters that flow over them. *See* 43 U.S.C. § 1311(a).

In 1990, in order to access all of the waters of the Nation River, including those waters of the Nation River upriver from the Yukon-Charley boundary, Mr. Sturgeon purchased a small personal hovercraft and licensed it with the State of Alaska as a watercraft. App. 8a. From 1990 through 2007, Mr. Sturgeon used the hovercraft to access moose hunting grounds on the Yukon River downstream from Eagle to the confluence of the Nation and Yukon Rivers, and on the Nation River thirty-five to forty miles upriver from the Yukon-Charley boundary. App. 8a. Operation of hovercraft on the Nation River is permissible under Alaska law.

In September of 2007, during his annual moose-hunting trip, Mr. Sturgeon entered the Nation River from the Yukon River for the purpose of taking the hovercraft upriver to hunt "moose meadows" and other stretches of the Nation River beyond the Yukon-Charley boundary. App. 8a. Approximately two miles upriver, while stopped on a gravel bar located below mean high water to engage

in some repairs, Mr. Sturgeon was approached by three armed NPS law enforcement employees. App. 8a. The NPS employees told Mr. Sturgeon it was a federal crime for him to operate the hovercraft within the boundaries of the Yukon-Charley. App. 8a. When Mr. Sturgeon advised the NPS employees that the hovercraft was being operated on a State-owned navigable river and thus the NPS water regulations did not apply, the NPS employees advised him that he was incorrect. App. 8a. Mr. Sturgeon complied with the NPS employees' directive to remove his hovercraft from within the boundaries of the Yukon-Charley App. 8a.

After returning from this hunt, Mr. Sturgeon had phone conversations and met with NPS Special Agent Andee Sears in Anchorage, Alaska. App. 9a. Ms. Sears agreed that the State of Alaska owned the submerged land within the banks of the Yukon and Nation Rivers, but reaffirmed NPS's position that use of a hovercraft within the boundaries of the Yukon-Charley is a federal crime, even on navigable waters or on submerged land between the banks of navigable rivers, and warned Mr. Sturgeon that he would be criminally cited if he ever again operated the hovercraft within the Yukon-Charley. App. 9a. As a result of these warnings by NPS officials and employees, Mr. Sturgeon has not used his hovercraft within the boundaries of the Yukon-Charley in subsequent hunting seasons; as a result, he has not been able to hunt areas of the Nation River and the Yukon River he had previously accessed on a regular basis with the use of his hovercraft. App. 9a.[3]

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3. In October 2010, Mr. Sturgeon, by and through counsel, sent a letter to then Secretary of the Interior Ken Salazar,

E. Proceedings Below

On September 14, 2011, Mr. Sturgeon filed a complaint in the U.S. District Court for the District of Alaska to, among other things, enjoin application of 36 C.F.R. § 1.2(a)(3) and 36 C.F.R. § 2.17(e) on various grounds under the APA. The State of Alaska intervened and joined in the challenge to these NPS regulations. The district court granted summary judgment to the NPS as to all claims. App. 35a-58a. Mr. Sturgeon and the State both timely appealed.

The Ninth Circuit affirmed, holding that ANILCA did not prohibit the NPS from asserting authority over non-public lands within CSUs pursuant to regulations of general applicability. To the Ninth Circuit, Section 103(c)'s restriction on NPS's power to impose on non-public land "regulations applicable solely to public lands within such units" was limited to Alaska-specific regulations. App. 25a-28a. ANILCA, which was passed in 1980, therefore did not supersede the general authority that Congress, in 1976, vested in the Secretary of Interior to "'[p]romulgate and enforce regulations concerning boating and other

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petitioning him to engage in rulemaking to repeal or amend NPS regulations so that the NPS would no longer assert the authority to restrict access on navigable waters located within the boundaries of park areas in Alaska. Mr. Sturgeon never received a response to this letter. App. 49a. Faced with this lack of response, on June 26, 2011 he wrote a letter to the NPS Alaska District Regional Chief Ranger, copying Ms. Sears, in which he requested written confirmation that he would be cited if he attempted to operate his hovercraft within the Yukon-Charley in the areas he had traditionally hunted. Mr. Sturgeon also never received a response to this letter. App 49a.

activities on or relating to waters located with areas of the National Park System, including waters subject to the jurisdiction of the United States.'" App. 31a (quoting 16 U.S.C. § 1a-2(h)).[4] The Ninth Circuit concluded that because the "hovercraft ban ... applies to all federal owned lands and waters administered by NPS nationwide"—and not only on federal lands within Alaska—it may be enforced on Alaskan land owned by the State, Native Corporations, and individuals. App. 26a.[5]

REASONS FOR GRANTING THE PETITION

The Ninth Circuit "has decided an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. Rule 10(c). The decision below has significant social and economic ramifications for the people of Alaska. It implicates not only Alaska's sovereignty and Mr. Sturgeon's liberty, but Alaskan Natives' dependence on access to the State's natural resources for economic sustainability. The Ninth Circuit's decision jeopardizes all of these interests in contravention of Section 103(c) of ANILCA, which squarely prohibits NPS from regulating non-federal Alaska land as if it were part of the National Park System.

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4. 16 U.S.C. § 1a-2(h) was repealed and recodified by Pub. L. 113-287, Dec. 19, 2014, 128 Stat. 3272. *See* 54 U.S.C. § 100751.

5. The Ninth Circuit rejected the government's argument that Mr. Sturgeon lacked standing. App. 10a-14a. But the court agreed with the government that the State lacked standing and instructed the district court to dismiss its complaint. App. 14a-20a.

I. The Petition Raises A Question of Exceptional Importance To The State of Alaska, Native Corporations, and Private Citizens.

Because no circuit split is possible on this issue, the key consideration for purposes of certiorari is whether the petition raises an important federal question. It is difficult to conceive of an issue of greater importance to the people of Alaska than the one presented here. This case concerns the regulatory disposition of more than 19 million acres of Alaskan land. Perhaps more than any other State, Alaska depends on the beneficial use of its land for "economic and social well-being." *Trustees for Alaska v. State*, 736 P.2d 324, 335 (Alaska 1987). Yet if the Ninth Circuit's decision is upheld, the ability of Alaskans to productively use their natural resources will be subject to the plenary control of NPS, which prefers to use the Alaska wilderness strictly for conservation purposes. As a result, it is likely that the developmental potential of this land will be unrealized. The economic ramifications of the Ninth Circuit's decision for the people of Alaska is a compelling basis for reviewing this petition. *See, e.g., Coeur Alaska, Inc. v. Se. Alaska Conservation Council*, 557 U.S. 261, 267 (2009).

Because the decision's economic impact will fall most harshly on Native Corporations, which own approximately 18 million acres of the non-public land at issue, the need for further review is all the more urgent. Congress passed ANCSA in 1971 to resolve the "aboriginal land claims." 43 U.S.C. § 1601(a). Under ANCSA, roughly 40 million acres of land were conveyed to Alaska Native regional and village corporations to "assist them in achieving financial independence and self-sufficiency." *City of Angoon*, 749 F.2d at 1414. "Congress contemplated that

land granted under ANCSA would be put primarily to three uses—village expansion, subsistence, and capital for economic development. Of these potential uses, Congress clearly expected economic development would be the most significant." *Koniag, Inc. v. Koncor Forest Resource*, 39 F.3d 991, 996 (9th Cir. 1994) (citations omitted). Congress thus extinguished aboriginal claims in exchange for land, on the understanding that Alaska Natives "would be able to develop that land and to realize that potential." *Id.* at 997. Under the Ninth Circuit's ruling, however, Native Corporations will be foreclosed from developing roughly 30 percent of the land that Congress conveyed to them to address "the real economic and social needs of Natives." 43 U.S.C. § 1601(b).

But the importance of this case extends far beyond the practical harms resulting from the Ninth Circuit's view of ANILCA. These non-public lands, including the specific territory at issue in this case, do *not* belong to the federal government. *See supra* at 14-15. "After a State enters the Union, title to the land is governed by state law. The State's power over the beds of navigable waters remains subject to only one limitation: the paramount power of the United States to ensure that such waters remain free to interstate and foreign commerce." *Montana v. United States*, 450 U.S. 544, 551 (1981). Alaska thus owns the "shores of navigable waters, and the soils under them." *John v. United States*, 720 F.3d 1214, 1224 (9th Cir. 2013). NPS's assertion of regulatory authority therefore impairs Alaska's sovereign right to manage and direct the use of these non-federal lands. The significant federalism concerns created by the Ninth Circuit's decision warrant this Court's attention. *See Bond v. United States*, 131 S. Ct. 2355, 2364 (2011) ("[T]he federal structure serves to

grant and delimit the prerogatives and responsibilities of the States and the National Government vis-a-vis one another. The allocation of powers in our federal system preserves the integrity, dignity, and residual sovereignty of the States.").

The basis for the State of Alaska's intervention in this dispute illustrates the point. The State sought to collect specimens from the bed of the Alagnak River in connection with fisheries research. App. 9a-10a. Although the riverbed is indisputably State-owned submerged land, NPS restricted the State's ability to access it, asserting that the Alagnak's location within the Katami National Park subjected it to NPS regulation. App 9a-10a. The State was therefore barred from accessing the riverbed until it applied for a permit, obtained approval, and granted ownership of the resulting samples to NPS. App. 15a. The State should not have to seek permission from the federal government to conduct environmental studies on its own land.

Indeed, the Ninth Circuit's reading of ANILCA to grant NPS control over non-federal lands raises a difficult constitutional question. Congress's Article I authority to wrest supervision and control of these lands from Alaska would need to derive from the Commerce Clause or the Property Clause. But neither provides the sweeping power NPS asserts here. Both require a showing that activities on State-owned water sufficiently impact NPS controlled land so as to justify extra-territorial regulation. *See, e.g.*, *United States v. Lindsey*, 595 F.2d 5, 6 (9th Cir. 1979); *State of Minnesota by Alexander v. Block*, 660 F.2d 1240, 1249 (8th Cir. 1981). Thus, while this authority allows NPS to enforce specific targeted regulations on non-federal

lands to protect federal lands, *see Lindsey*, 595 F.2d at 6, it is not blanket authorization for the NPS to enforce the entirety of its regulations on non-federal lands, especially when NPS seeks to infringe on state sovereignty and regulate state-owned lands.

These important constitutional issues are not just a means to resolving a turf war between NPS and the State of Alaska. "Federalism is more than an exercise in setting the boundary between different institutions of government for their own integrity. State sovereignty is not just an end in itself: Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power ... Federalism secures the freedom of the individual." *Bond*, 131 S. Ct. at 2364 (citations and quotations omitted). "The fragmentation of power produced by the structure of our Government is central to liberty, and when we destroy it, we place liberty at peril." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2677 (2012) (joint dissent). This case shows just how true that is.

As noted above, Mr. Sturgeon has held a resident hunting license in Alaska for the past 40 years and has used a small personal hovercraft, which he licensed with the State of Alaska, to access moose hunting grounds on the Yukon River since 1990. App. 8a. Yet, in 2007, he was approached by armed NPS officials who told him it was illegal to use the hovercraft. App. 8a. Petitioner was later informed that he would be subject to federal prosecution if he ever attempted to use the hovercraft again. App. 9a. It is difficult to conceive of a more severe threat to individual liberty than being threatened with criminal citation. NPS should not be permitted to threaten Mr. Sturgeon with criminal penalties for using a state-approved hovercraft for a state-approved purpose on non-federal land.

Unlike other instances, the significant practical and structural concerns raised by this case are not the result of Congress's desire to press the boundaries of its Article I authority. Congress has not demanded federal regulatory control over millions of acres of Alaskan land. It is instead NPS's assertion of expansive authority under a federal law specifically designed to curb its power, *see infra* at 23-30, and the Ninth Circuit's decision to accept that contorted interpretation that has led to this confrontation. This case epitomizes the concern that "[t]he administrative state wields vast power and touches almost every aspect of daily life.... It would be a bit much to describe the result as the very definition of tyranny, but the danger posed by the growing power of the administrative state cannot be dismissed." *City of Arlington, Tex. v. FCC*, 133 S. Ct. 1863, 1878-79 (2013) (Roberts, C.J., dissenting) (citations and quotation omitted). The administrative state's assertion of power over all manner of "economic, social, and political" activity, *id.* at 1878, is troublesome enough when it comes with the imprimatur of Congress. This Court's attention is certainly required where, as here, it does not.

II. The Ninth Circuit's Interpretation of Section 103(c) of ANILCA Is Unsustainable Under This Court's Decisions.

The question presented asks whether Section 103(c) of ANILCA prohibits NPS from managing and regulating Alaskan and Native Corporation non-federal lands located within the National Park System as if they were part of the National Park System. Contrary to the Ninth Circuit's ruling, the statute unambiguously denies this authority to NPS. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency,

must give effect to the unambiguously expressed intent of Congress." *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984). Because the intent behind Section 103(c) is clear, the ruling conflicts with this Court's prior decisions and should be reversed.

Section 103(c) states that "[o]nly those lands within the boundaries of any conservation system unit which are public lands (as such term is defined in the Act) shall be deemed to be included as a portion of such unit." 16 U.S.C. § 3103(c). Under the statute, "public lands" means "land situated in Alaska which, after December 2, 1980, are Federal lands" and excludes from its ambit lands belonging to the "State of Alaska," "a Native Corporation," or "lands referred to in Section 19(b) of the Alaska Native Claims Settlement Act." *Id.* § 3102(3). Accordingly, "[n]o lands, which, before, on, or after December 2, 1980, are conveyed to the State, to any Native Corporation, or to any private party shall be subject to the regulations applicable solely to public lands within such units." *Id.* § 3103(c). "If the State, a Native Corporation, or other owner desires to convey any such lands, the Secretary may acquire such lands in accordance with applicable law (including this Act), and any such lands shall become part of the unit, and be administered accordingly." *Id.*

The law is straightforward. Under Section 103(c), State, Native Corporation, and private land within the boundaries of the ANILCA conservation system units are not part of these units and may not be managed as though they are. Each sentence of Section 103(c) clarifies, in different ways, that State, Native Corporation, and private land is not to be managed or otherwise treated as part of a CSU. Section 103(c) thus removes these lands from the

reach of the vast array of federal regulations promulgated to manage public lands, such as the hovercraft regulation at issue here, and forecloses the ability of NPS and other federal agencies to exert authority beyond public lands in Alaska. Accordingly, any NPS regulation that attempts to manage non-federal land in Alaska as if it is public land is not in accordance with law.

This interpretation follows not only from the law's plain meaning, it vindicates Congress's purpose. *See, e.g.*, *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 300 (1988). ANILCA's dramatic expansion of federal park acreage raised serious concerns that it would sacrifice the needs of Alaskans who live off this land. *See supra* at 7-11. Section 103(c) struck a balance. It "provides sufficient protection for the national interest in the scenic, natural, cultural and environmental values on the public lands in Alaska, and at the same time provides adequate opportunity for satisfaction of the economic and social needs of the State of Alaska and its people." 16 U.S.C. § 3101(d). The statute accomplished this objective by "[s]pecifying that only public lands (and not State or private lands) are to be subject to the conservation unit regulations applying to public lands." H. Cong. Res. 452, 96th Cong. (Nov. 21, 1980); *see also* S. Rep. No. 96-413 at 303 (Nov. 14, 1979) ("Those private lands, and those public lands, owned by the State of Alaska ... are not to be construed as subject to the management regulations which may be adopted to manage and administer any national conservation system unit which is adjacent to, or surrounds, the private or non-Federal public lands."). The whole point was to "make clear beyond any doubt that any State, Native, or private lands, which may lie within the outer boundaries of the conservation system unit are not parts of that unit and

are not subject to regulations which are applied to public lands, which, in fact, are part of the unit." 125 Cong. Rec. H3240 (May 15, 1979). The inclusion of Section 103(c) in the final version of ANILCA reflected a deliberate choice by Congress to preserve State management and limit NPS authority over these lands.

That is why, until 1996, NPS correctly interpreted Section 103(c) just as Petitioner does here. *See supra* at 11-14. In 1981, NPS explained that its "regulations would not apply to activities occurring on Native or any other non-federally owned land interests located inside park area boundaries." 46 Fed. Reg. 31843 (June 17, 1981). Further, in 1987, NPS reaffirmed that: "Except for regulations containing provisions that are specifically applicable, regardless of land ownership, on lands and waters within a park area that are under the legislative jurisdiction of the United States, the regulations contained in Parts 1 through 5 and Part 7 of this chapter do not apply on non-federally owned lands and waters or on Indian lands and waters owned individually or tribally within the boundaries of a park area." 52 Fed. Reg. 35238 (Sept. 18, 1987). That is, NPS interpreted Section 103(c) faithful to its terms by limiting NPS's regulatory authority to public lands in Alaska.

The Ninth Circuit nevertheless rejected this reading based on a crabbed interpretation of Section 103(c). App. 25a-28a. In the Ninth Circuit's view, the limitation on NPS authority to impose "regulations applicable solely to public lands within such units" applies only to Alaska-specific NPS regulations. App. 25a-26a. According to the Ninth Circuit, NPS was thus free to ban hovercrafts on non-federal Alaskan lands under its general authority to

"[p]romulgate and enforce regulations concerning boating and other activities on or relating to waters located within areas of the National Park System," 16 U.S.C. § 1a-2(h), so long as the ban was applied "to all federal-owned lands and waters administered by NPS nationwide" and not just to Alaska public lands. App. 25-26a. This interpretation of Section 103(c) is unsustainable.

Although its reasoning is far from clear, the Ninth Circuit appears to derive its Alaska-specific interpretation of Section 103(c) from its determination that "[t]he plain text of § 103(c) only exempts nonfederal land from 'regulations applicable *solely* to public lands within [CSUs].'" App. 25a (emphasis in original). The Ninth Circuit believed that this language limited Section 103(c) to "*CSU-specific regulations*." App. 25a (emphasis in original). But the Ninth Circuit drew the line in the wrong place. ANILCA does not distinguish between regulations applying nationwide and those applying only "within such units" in Alaska. The law distinguishes between NPS's authority to manage "public lands within such units" and its lack of authority to manage non-public (*i.e.*, non-federal) lands *within such units*. That point is made clear by the preceding sentence: "Only those lands within the boundaries of any conservation system unit which are public lands (as such term is defined in this Act) shall be deemed to be included as a portion of such unit." 16 U.S.C. § 3103(c). The Ninth Circuit committed the cardinal error of reading the phrase "within such units" in "isolation" instead of "the context in which it is used." *Deal v. United States*, 508 U.S. 129, 132 (1993).

The Ninth Circuit sought to draw additional support from Section 103(c)'s use of the word "solely," since

nationwide NPS regulations are not "solely" applicable to federal lands in Alaska. App. 25a. The Ninth Circuit claimed that only this interpretation could reconcile the statutory text with Congress's statement that "'[f]ederal laws and regulations of general applicability to both private and public lands' are 'unaffected,' and 'would be applicable to private or non-federal public land holdings within [CSUs].'" App. 27a-28a (quoting S. Rep. 96-413, at 303 (1979)). But the Ninth Circuit's textual analysis again missed the mark.

Congress inserted "solely" into Section 103(c) to avoid inadvertently nullifying *all* federal statutes and regulations applicable to non-federal lands in Alaska. That is, Congress was careful to ensure that ANILCA did not exempt non-federal lands in Alaska from laws such as the Clean Air Act and the Clean Water Act. These are the federal laws of "general applicability" (and not the run-of-the-mill NPS management regulations) that were to be "unaffected" by ANILCA:

> Federal laws and regulations of general applicability to both private and public lands, such as the Clean Air Act, the Water Pollution Control Act, U.S. Army Corps of Engineers wetland regulations and other Federal statutes of general applicability would be applicable to private or non-Federal public land in holdings within conservations [sic] system units, and to such lands adjacent to conservation system units, and thus are unaffected by the passage of the bill.

S. Rep. 96-413, at 303 (1979). Had the Ninth Circuit not selectively quoted from the Senate Report, this would have been clear.

But even if there were some support for the Ninth Circuit's Alaska-specific version of Section 103(c), which there is not, the statute should be interpreted to avoid a "nonsensical result" if the text will allow it. *Paroline v. United States*, 134 S. Ct. 1710, 1729 (2014). As explained above, the Ninth Circuit's reading exempts non-federal lands from NPS's Alaska-specific regulations, but not from NPS's nationwide regulations. Under that reading, then, non-federal land could not benefit when NPS exempts Alaska national parks from a more restrictive nationwide rule. By the Ninth Circuit's reasoning, the non-public land would remain subject to the more restrictive nationwide regulation. If NPS decided to exempt Alaska public lands from the hovercraft regulations, the non-federal lands (*i.e.*, State, private, and Native-owned) would, paradoxically, still be subject to the ban.

This is not some wild hypothetical. There are many NPS regulations that make allowances for Alaska public lands that are not applicable to the rest of the National Park System. For example, NPS has granted Alaska parks more liberal hunting, trapping, and motorized access rules because of the unique terrain. *See, e.g.*, 36 C.F.R. §§ 13.25, 13.30, 13.45, 13.182. It is nonsensical to interpret Section 103(c) to force non-federal land in Alaska to abide by the more restrictive nationwide rule instead of benefiting from the less restrictive Alaska-specific rule. Yet that is where the Ninth Circuit's ruling leads. The better interpretation of Section 103(c) is one that, as Congress clearly intended, leaves day-to-day management of these non-federal lands

to their owners: the State of Alaska, Native Corporations, and private individuals.

At base, the Ninth Circuit's interpretation violates the "text, structure, and purpose" of ANILCA. *Maracich v. Spears*, 133 S. Ct. 2191, 2196 (2013). Section 103(c) was enacted to enforce the law's bargain that those lands not transferred to the federal government would be subject to state and local management. *See supra* at 5-11. Under the Ninth Circuit's reasoning, however, the promise is illusory. If the decision below is allowed to stand, NPS could easily circumvent any limitation on its day-to-day management authority merely by regulating on a nationwide basis. There is no basis for interpreting Section 103(c) to defeat ANILCA's objective of preserving state authority, private property rights, and Native Alaskan land rights within the new federal park lands it created. Certainly not when there is a strong textual basis for interpreting the law to achieve that unambiguous congressional purpose.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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APPENDIX

APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED DECEMBER 16, 2014

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 13-36165

JOHN STURGEON,

Plaintiff-Appellant,

STATE OF ALASKA,

Plaintiff-Intervenor,

v.

SUE MASICA, in her official capacity as Alaska Regional Director of the National Park Service; GREG DUDGEON; ANDEE SEARS; SALLY JEWELL, Secretary of the Interior; JONATHAN JARVIS, in his official capacity as Director of the National Park Service; THE NATIONAL PARK SERVICE; THE UNITED STATES DEPARTMENT OF THE INTERIOR,

Defendants-Appellees.

D.C. No. 3:11-cv-00183-HRH
District of Alaska,
Anchorage

Appendix A

ORDER

Before: FARRIS, D.W. NELSON, and NGUYEN, Circuit Judges.

Judge Farris, Nelson, and Nguyen have voted to deny the petitions for panel rehearing filed by Plaintiff-Appellant John Sturgeon and Plaintiff-Intervenor State of Alaska. Judge Nguyen has voted to deny the petitions for rehearing *en banc* filed by Sturgeon and the State of Alaska, and Judges Farris and Nelson so recommend.

The full court has been advised of the petitions, and no judge of the court has requested a vote on the petitions for rehearing *en banc*. Fed. R. App. P. 35.

The petitions for rehearing and rehearing *en banc* are DENIED.

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED OCTOBER 6, 2014

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 13-36165

D.C. No. 3:11-cv-00183-HRH

JOHN STURGEON,

Plaintiff-Appellant,

STATE OF ALASKA,

Plaintiff-Intervenor,

v.

SUE MASICA, in her official capacity as Alaska Regional Director of the National Park Service; GREG DUDGEON; ANDEE SEARS; SALLY JEWELL, Secretary of the Interior; JONATHAN JARVIS, in his official capacity as Director of the National Park Service; THE NATIONAL PARK SERVICE; THE UNITED STATES DEPARTMENT OF THE INTERIOR,

Defendants-Appellees.

Appendix B

No. 13-36166

D.C. No. 3:11-cv-00183-HRH

STATE OF ALASKA,

Intervenor-Plaintiff-Appellant,

and

JOHN STURGEON,

Plaintiff,

v.

SUE MASICA, in her official capacity as Alaska Regional Director of the National Park Service; GREG DUDGEON; ANDEE SEARS; SALLY JEWELL, Secretary of the Interior; JONATHAN JARVIS, in his official capacity as Director of the National Park Service; THE NATIONAL PARK SERVICE; THE UNITED STATES DEPARTMENT OF THE INTERIOR,

Defendants-Appellees.

Appeal from the United States District Court
for the District of Alaska
H. Russel Holland, Senior District Judge, Presiding

August 12, 2014, Argued and Submitted,
Anchorage, Alaska

Appendix B

October 6, 2014, Filed

Before: Jerome Farris, Dorothy W. Nelson, and Jacqueline H. Nguyen, Circuit Judges.

Opinion by Judge Nguyen

SUMMARY*

Standing / National Park Service

The panel affirmed the district court's summary judgment in favor of federal appellees, and vacated the judgment against intervenor/appellant State of Alaska, due to its lack of standing, in an action brought by John Sturgeon challenging the National Park Service's enforcement of a regulation banning the operation of hovercrafts on the Nation River.

Tha National Park Service ("NPS") ban prevented Sturgeon from using his personal hovercraft on his moose hunting trips on the Nation River, part of which falls within the Yukon-Charley Rivers National Preserve. The State of Alaska intervened, challenging NPS's authority to require its researchers to obtain a permit before engaging in studies of chum and sockeye salmon on the Alagnak River, part of which falls within the boundaries of the Katmai National Park and Preserve.

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* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

Appendix B

The panel held that Sturgeon established Article III standing. The panel also held that the federal appellees waived their prudential standing arguments. The panel further held that the State of Alaska lacked standing to challenge the NPS regulations. The panel vacated the district court's judgment as to Alaska, and remanded with instructions that Alaska's case be dismissed for lack of jurisdiction.

The panel rejected Sturgeon's contention that § 103(c) of the Alaska National Interest Lands Conservation Act precluded NPS from regulating activities on state-owned lands and navigable waters that fell within the boundaries of National Park System units in Alaska. The panel held that Sturgeon's interpretation of § 103(c) was foreclosed by the plain text of the statute. The panel held that even assuming that the waters of and lands beneath the Nation River had been "conveyed to the State" for purposes of the Alaska National Interest Lands Conservation Act § 103(c), NPS's hovercraft ban was not a regulation that applied solely to public lands within conservation system units in Alaska; and given its general applicability, the regulation could be enforced on both public and nonpublic lands alike within conservation system units.

The panel also rejected Sturgeon's arguments that the Secretary of the Interior exceeded her statutory authority in promulgating the regulation at issue, and that her action raised serious constitutional concerns.

Appendix B

OPINION

NGUYEN, Circuit Judge:

John Sturgeon ("Sturgeon") challenges the National Park Service's ("NPS") enforcement of a regulation banning the operation of hovercrafts on the Nation River, part of which falls within the Yukon-Charley Rivers National Preserve. The ban prevented Sturgeon from using his personal hovercraft on his moose hunting trips on the Nation River. The State of Alaska intervened, challenging NPS's authority to require its researchers to obtain a permit before engaging in studies of chum and sockeye salmon on the Alagnak River, part of which falls within the boundaries of the Katmai National Park and Preserve.

Sturgeon and Alaska present the same legal argument: § 103(c) of the Alaska National Interest Lands Conservation Act ("ANILCA") precludes NPS from regulating activities on state-owned lands and navigable waters that fall within the boundaries of National Park System units in Alaska. The district court granted summary judgment in favor of the federal appellees. Because we find that Sturgeon's interpretation of § 103(c) is foreclosed by the plain text of the statute, we affirm as to Sturgeon. We hold that Alaska lacks standing to bring this challenge, and thus vacate and remand with instructions that Alaska's case be dismissed.

Appendix B

I.

The facts are straightforward and largely undisputed. Since 1971, Sturgeon has hunted moose on an annual basis on the Nation River.[1] The lower six miles of the Nation River lie within the Yukon-Charley Rivers National Preserve ("Yukon-Charley"), which is a unit of the National Park System. In 1990, Sturgeon purchased a small, personal hovercraft, which he used on his hunting excursions. In September 2007, while repairing his hovercraft on a gravel bar adjoining the river, Sturgeon was approached by three NPS law enforcement employees. They informed him that NPS regulations prohibited the operation of hovercrafts within the Yukon-Charley and issued him a verbal warning. Sturgeon protested that the NPS regulations were inapplicable because he was operating his hovercraft on a state-owned navigable river. Sturgeon contacted his attorney via satellite phone, who in turn contacted Andee Sears, a Regional Law Enforcement Specialist with NPS. Sears told Sturgeon's attorney that the hovercraft must be removed from the Yukon-Charley. Sturgeon complied.

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1. The Nation River is a tributary of the Yukon River. While Sturgeon's complaint also mentions his hunting excursions on the Yukon River, part of which also falls within the Yukon-Charley Rivers National Preserve, he failed to raise a separate claim for the Yukon River. Thus, the district court found that only the applicability of the regulation to the Nation River was before the court. *Sturgeon v. Masica*, No. 3:11-CV-0183-HRH, 2013 U.S. Dist. LEXIS 157078, 2013 WL 5888230, at *6 (D. Alaska Oct. 30, 2013). Sturgeon does not challenge that finding on appeal.

Later, Sturgeon followed up with Sears over the phone and met with him in Anchorage. Sears advised Sturgeon that even though Alaska might own the submerged land beneath the river, the hovercraft ban was nonetheless in force within the boundaries of the Yukon-Charley. Sears warned Sturgeon that he risked criminal liability if he operated his hovercraft within the Yukon-Charley. In response to these warnings, Sturgeon refrained from using his hovercraft during the 2008 to 2010 moose hunting seasons and has not been able to hunt on the portions of the Nation River that fall within the boundaries of the Yukon-Charley.

Although Sturgeon sent a letter to then-Secretary of the Interior, Ken Salazar, petitioning for repeal or amendment of the NPS regulations restricting his access to navigable waters located within national park boundaries, he did not receive a response. He then sued in federal district court, seeking an order declaring that NPS's regulations violated ANILCA, as applied to him on state-owned lands and waters, and enjoining the federal defendants from enforcing these regulations.

Alaska intervened, raising the same argument that the application and enforcement of NPS regulations on state-owned lands and waters violated ANILCA. Specifically, Alaska challenged NPS regulations that required employees of the Alaska Department of Fish and Game to obtain a scientific research and collecting permit before engaging in genetic sampling of chum and sockeye salmon on the Alagnak River. These regulations purportedly harmed Alaska "in the form of increased

staff time and expense in complying with NPS procedures and in the form of delays in implementing the project." Alaska further argued that NPS's actions both interfered with its sovereign right to manage and regulate its lands and waters and chilled its citizens' ability to enjoy the rights and benefits flowing from its management of state resources.

On summary judgment, the district court ruled in favor of the federal appellees. *Sturgeon v. Masica*, No. 3:11-CV-0183-HRH, 2013 U.S. Dist. LEXIS 157078, 2013 WL 5888230, at *9 (D. Alaska Oct. 30, 2013). The district court found that Sturgeon's and Alaska's interpretation of ANILCA § 103(c) lacks support in the plain language of the statute. 2013 U.S. Dist. LEXIS 157078, [WL] at *8-*9. This appeal followed.

II.

We review questions of law resolved on summary judgment de novo, and the district court's factual findings for clear error. *Al Haramain Islamic Found., Inc. v. U.S. Dep't of Treasury*, 686 F.3d 965, 976 (9th Cir. 2012).

III.

As an initial matter, the federal appellees contend that we lack jurisdiction over this appeal because Sturgeon and Alaska have failed to establish standing. Even though the federal appellees did not present these arguments to the district court below, they may nonetheless do so for the first time on appeal. The constitutional requirements for

standing under Article III are jurisdictional, cannot be waived by any party, and may be considered sua sponte. *City of Los Angeles v. Cnty. of Kern*, 581 F.3d 841, 845 (9th Cir. 2009). The oft-repeated "irreducible constitutional minimum of standing contains three elements." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992). "First, the plaintiff must have suffered an 'injury in fact,'" which is both concrete and particularized, as well as actual or imminent. *Id.* "Second, there must be a causal connection between the injury and the conduct complained of," meaning that the injury must be "fairly traceable to the challenged action of the defendant." *Id.* (quoting *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42, 96 S. Ct. 1917, 48 L. Ed. 2d 450 (1976) (quotation mark and alterations omitted)). Third, it must be likely that a favorable decision would redress the injury identified. *Id.* at 561.

Apart from these constitutional concerns, "there exists a body of 'judicially self-imposed limits on the exercise of federal jurisdiction'" that forms the prudential standing doctrine. *Cnty. of Kern*, 581 F.3d at 845 (quoting *Allen v. Wright*, 468 U.S. 737, 751, 104 S. Ct. 3315, 82 L. Ed. 2d 556 (1984)); *see also Sprint Commc'ns Co., L.P. v. APCC Servs., Inc.*, 554 U.S. 269, 289-90, 128 S. Ct. 2531, 171 L. Ed. 2d 424 (2008). Because these considerations are nonconstitutional in nature, they may be deemed waived if not previously raised before the district court. *Cnty. of Kern*, 581 F.3d at 845.

Appendix B

A.

We find that Sturgeon has established standing. The federal appellees argue that Sturgeon has failed to show probable or imminent enforcement of the NPS regulations to meet the first requirement of an injury-in-fact. The federal appellees' view, however, cannot be reconciled with the Supreme Court's recent decision in *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 189 L. Ed. 2d 246 (2014), where the Court emphasized that *threatened* enforcement actions may suffice to create Article III injuries. "When an individual is subject to such a threat, an actual arrest, prosecution, or other enforcement action is not a prerequisite to challenging the law." *Id.* at 2342. Thus, "a plaintiff satisfies the injury-in-fact requirement where he alleges 'an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder.'" *Id.* (quoting *Babbitt v. Farm Workers Nat'l Union*, 442 U.S. 289, 298, 99 S. Ct. 2301, 60 L. Ed. 2d 895 (1979)).

Sturgeon has satisfied the injury-in-fact requirement. He has alleged an intention to use his hovercraft, and has contacted both NPS and the Department of the Interior regarding the applicability and enforcement of the regulation to his hovercraft use. Sturgeon's inability to use his hovercraft for moose-hunting purposes arguably implicates his right under the Privileges or Immunities Clause of the Fourteenth Amendment "to use the navigable waters of the United States, however they may penetrate the territory of the several States."

The Slaughter-House Cases, 83 U.S. 36, 79, 21 L. Ed. 394 (1872); *see also Courtney v. Goltz*, 736 F.3d 1152, 1160 (9th Cir. 2013) (interpreting the Privileges or Immunities Clause to encompass "a right to *navigate* the navigable waters of the United States"). Sturgeon thus alleges "an intention to engage in a course of conduct arguably affected with a constitutional interest." *Susan B. Anthony List*, 134 S. Ct. at 2342 (quoting *Babbitt*, 442 U.S. at 298).

Further, there is no dispute that his intended conduct is proscribed by NPS regulation. *See* 36 C.F.R. § 2.17(e) (stating that "[t]he operation or use of hovercraft is prohibited" within NPS-administered lands and waters, which include the Yukon-Charley). Finally, "there exists a credible threat of prosecution thereunder." *Susan B. Anthony List*, 134 S. Ct. at 2342 (quoting *Babbitt*, 442 U.S. at 298). The federal appellees concede that Sturgeon received a verbal warning not to use the hovercraft, that Special Agent Sears told Sturgeon's lawyer that Sturgeon "should remove the hovercraft from the preserve," and that Sears later indicated that Sturgeon "[might] be subject to criminal liability if he operated a hovercraft in the preserve."[2] These facts are sufficient to show a credible threat of enforcement against Sturgeon.

Next, the federal appellees argue that any injury-in-fact identified by Sturgeon is not "fairly traceable" to actions of NPS. We disagree. The regulation was promulgated by NPS and enforcement has been

2. Indeed, if Sturgeon violated NPS's hovercraft ban, he would risk incurring a fine and imprisonment for up to six months. *See* 36 C.F.R. § 1.3(a).

threatened by NPS employees. Therefore, Sturgeon's injuries are "fairly traceable" to actions of NPS. Finally, a favorable decision would redress Sturgeon's identified injury-in-fact, and the federal appellees do not contend otherwise.

In addition to contending that Sturgeon lacks Article III standing, the federal appellees argue that prudential considerations of ripeness and adverseness militate against a finding of standing. However, the federal appellees failed to raise these arguments before the district court. We thus find them waived, as prudential standing arguments "can be deemed waived if not raised in the district court" due to their nonconstitutional nature.[3] *Cnty. of Kern*, 581 F.3d at 845 (quoting *Bd. of Natural Res. v. Brown*, 992 F.2d 937, 946 (9th Cir. 1993)) (internal quotation marks omitted).

B.

The State of Alaska, on the other hand, lacks standing. Alaska offers three bases to support its standing: (1) harm "in the form of increased staff time and expense" in obtaining and complying with the terms of a scientific research and collecting permit; (2) injuries to Alaska's sovereign right to control its lands and waters; and (3) the Secretary of the Interior's denial of its petition for

3. Moreover, it may be that the "Article III standing and ripeness issues in this case 'boil down to the same question'"—namely, whether a sufficient injury-in-fact exists to render the case ripe. *Susan B. Anthony List*, 134 S. Ct. at 2341 n.5 (quoting *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128 n.8, 127 S. Ct. 764, 166 L. Ed. 2d 604 (2007)).

administrative proceedings that would repeal or amend the regulations at issue. We address each of the proffered bases in turn.

With regard to Alaska's chum and sockeye salmon study, the increased burdens to Alaska as a result of NPS's permit requirement clearly constitute injuries-in-fact. It is undisputed that NPS employees informed Alaska's Department of Fish and Game ("DFG") that a scientific research and collecting permit was required before it engaged in the study. The scientific research and collecting permit that DFG actually obtained and the General Conditions and Park Specific Guidance that accompanied it—all of which are part of the record—demonstrate that DFG was forced to comply with numerous obligations and limitations under the terms of the permit. To name just a few, DFG was not allowed to destroy research specimens without NPS's prior authorization, was obligated to catalogue collected specimens into NPS's Interior Collections Management System and label such specimens with NPS accession and catalog numbers, and was required to submit an Investigator's Annual Report and copies of other final reports and publications resulting from the study within a year of publication. The record thus amply supports Alaska's allegation of harm in the form of increased staff time and expense.

But while Alaska may have suffered cognizable injuries, a favorable ruling would not redress these injuries. Alaska's complaint sought a declaration that the NPS regulations were invalid and void as applied to state-owned lands and waters and an injunction barring future

enforcement of the regulations on state-owned lands and waters. Such relief would not remedy injuries relating to DFG's chum and sockeye salmon study in 2010, which have already been incurred and suffered. At oral argument, Alaska represented that DFG's chum and sockeye salmon study is complete, and the record offers no indication that related studies or efforts are pending or forthcoming. In the absence of evidence showing how the requested relief would redress its identified injuries, Alaska may not rely on activities relating to the 2010 study of chum and sockeye salmon to establish standing. *Cf. Lujan*, 504 U.S. at 564 ("Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects." (alteration in original) (quoting *Los Angeles v. Lyons*, 461 U.S. 95, 102, 103 S. Ct. 1660, 75 L. Ed. 2d 675 (1983)) (internal quotation marks omitted).

The second basis proffered by Alaska presents a closer question. Alaska argues that the NPS regulations violate its "sovereign[]" and "proprietary interests" in its lands and waters, and interfere with its "authority and ability to manage its property in accordance with the Alaska Constitution and state law." States certainly possess sovereign and proprietary interests that may be pursued via litigation. *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 601-02, 102 S. Ct. 3260, 73 L. Ed. 2d 995 (1982); *see also, Pennsylvania v. New Jersey*, 426 U.S. 660, 665, 96 S. Ct. 2333, 49 L. Ed. 2d 124 (1976) ("It has . . . become settled doctrine that a State has standing to sue only when its sovereign or quasi-sovereign interests are implicated . . . ."). However, we conclude

that Alaska's arguments are unavailing for purposes of establishing standing under the circumstances of this case.

To begin with, Alaska failed to meet the requirement that its purported injuries be "actual or imminent." *Lujan*, 504 U.S. at 560 (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155, 110 S. Ct. 1717, 109 L. Ed. 2d 135 (1990)) (internal quotation mark omitted). Because Alaska did not identify any actual conflict between NPS's regulations and its own statutes and regulations, we are left with only a vague idea of how exactly NPS's permitting requirement infringes on the state's sovereign and proprietary interests in its lands and waters, or how the requirement interferes with the state's control over and management of those lands and waters. In the absence of such a conflict, Alaska's purported injuries are too "conjectural or hypothetical" to constitute injuries-in-fact. *Id.* (quoting *Whitmore*, 495 U.S. at 155) (internal quotation marks omitted).

Alaska has cited no case that finds standing based simply on purported violations of a state's sovereign rights. Rather, evidence of actual injury is still required. For example, in *Massachusetts v. EPA*, 549 U.S. 497, 127 S. Ct. 1438, 167 L. Ed. 2d 248 (2007), the Supreme Court found that Massachusetts had standing to challenge the EPA's denial of a rulemaking petition requesting regulation of greenhouse gas emissions under the Clean Air Act. *Id.* at 510-11, 526. The Court noted that the state was due "special solicitude in [the] standing analysis" based on two factors: (1) Massachusetts sought to vindicate a procedural right, which eliminated the need under Article

III to demonstrate redressability and immediacy, and (2) Massachusetts's status as a "sovereign State." *Id.* at 517-20; *see also Washington Envtl. Council v. Bellon*, 732 F.3d 1131, 1144-45 (9th Cir. 2013) (distinguishing *Massachusetts v. EPA*). Even in light of this special solicitude, however, the Court specifically found that "[b]ecause the Commonwealth 'own[ed] a substantial portion of the state's coastal property,' it ha[d] alleged a particularized injury in its capacity as a landowner" due to rising global sea levels. *Massachusetts*, 549 U.S. at 522 (citation omitted).

Similarly, in *Oregon v. Legal Services Corp.*, 552 F.3d 965 (9th Cir. 2009), Oregon contended that a private, nonprofit corporation established by the United States to provide federal funds to local legal assistance programs "thwart[ed] [its] efforts at policy making with regards to Oregon's Legal Service Program." *Id.* at 973. We rejected Oregon's claim because "there [was] no dispute over Oregon's ability to regulate its legal services program, and no claim that Oregon's laws ha[d] been invalidated as a result of the [corporation's] restrictions." *Id.* Because Oregon was able "to regulate its legal service programs as it desire[d]," there was thus "no judicially cognizable injury." *Id.* at 974.

Finally, *Nevada v. Burford*, 918 F.2d 854 (9th Cir. 1990), is also illustrative. Nevada challenged the Bureau of Land Management's decision to grant a right-of-way over state-owned land to the Department of Energy. *Id.* at 855. Because Nevada's complaint was "silent as to how [the Bureau's] alleged violations . . . resulted in injury to Nevada," in the absence of demonstrated injury, its claim

"'constitute[d] a generalized grievance that the [Bureau] [was] not acting in . . . accordance' with federal laws" and was thus "insufficient to demonstrate standing." *Id.* at 856-57 (first, third, and fourth alterations added, second alteration in original) (quoting *Nevada v. Burford*, 708 F. Supp. 289, 295 (D. Nev. 1989)). *See also Table Bluff Reservation (Wiyot Tribe) v. Philip Morris, Inc.*, 256 F.3d 879, 883 (9th Cir. 2001) (finding no injury-in-fact where twenty Native American tribes challenged a Master Settlement Agreement between Philip Morris, Inc. and forty-six states, five territories, and the District of Columbia because the tribes identified no tribal regulations or contracts that would be affected by the Agreement).

Similarly, here, Alaska's claims regarding its sovereign and proprietary interests lack grounding in a demonstrated injury. While Alaska alleges that NPS regulations "have directly interfered with Alaska's ability as a sovereign to manage and regulate its land and waters," Alaska identifies no conflict between NPS regulations and its own state statutes and regulations.[4]

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4. Alaska also alleges that the NPS regulations have had "a chilling effect" on Alaskans' use and enjoyment of state-owned lands and waters. But "a state does not have standing 'to protect her citizens from the operation of federal statutes.'" *Oregon v. Legal Servs. Corp.*, 552 F.3d 965, 971 (9th Cir. 2009) (quoting *Massachusetts v. EPA*, 549 U.S. 497, 520 n.17, 127 S. Ct. 1438, 167 L. Ed. 2d 248 (2007)). And "the State must articulate an interest apart from the interests of particular private parties." *Id.* (quoting *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 607, 102 S. Ct. 3260, 73 L. Ed. 2d 995 (1982)) (internal quotation mark omitted). Alaska has failed to do so.

Any injury to Alaska's sovereign and proprietary interest is pure conjecture and thus insufficient to establish standing.

The third and final basis upon which Alaska relies to establish standing is the Secretary of the Interior's denial of its petition for new administrative proceedings. A plaintiff possesses standing to enforce procedural rights "so long as the procedures in question are designed to protect some threatened concrete interest of his that is the ultimate basis of his standing." *Lujan*, 504 U.S. at 573 n.8. As discussed above, Alaska fails to identify any "threatened concrete interest." Alaska cannot rely on the Secretary's denial of its petition because "[p]articipation in agency proceedings is alone insufficient to satisfy judicial standing requirements." *Gettman v. Drug Enforcement Admin.*, 290 F.3d 430, 433, 351 U.S. App. D.C. 344 (D.C. Cir. 2002) (quoting *Fund Democracy, LLC v. SEC*, 278 F.3d 21, 27, 349 U.S. App. D.C. 347 (D.C. Cir. 2002)) (internal quotation marks omitted). Alaska's "right to petition the agency does not in turn 'automatic[ally]' confer Article III standing when that right is deprived." *Id.* (alteration in original) (quoting Pet'rs' Br.).

Therefore, we hold that Alaska has failed to establish standing to challenge the NPS regulations. We vacate the district court's judgment as to Alaska and remand with instructions that Alaska's case be dismissed for lack of jurisdiction.

Appendix B

IV.

We now turn to the merits of Sturgeon's challenge. Sturgeon contends that § 103(c) of ANILCA bars the application and enforcement of NPS's hovercraft ban on the Nation River,[5] which he contends is state-owned land. According to Sturgeon, the plain text of the statute, its legislative history, and our decision in *City of Angoon v. Marsh*, 749 F.2d 1413 (9th Cir. 1984), support his view. Before explaining why we find Sturgeon's contentions unpersuasive, we offer a bit of background.

A.

ANILCA, enacted in 1980, offered new "protection[s] for the national interest in the scenic, natural, cultural and environmental values on the public lands in Alaska, and at the same time provide[d] adequate opportunity for satisfaction of the economic and social needs of the State of Alaska and its people." 16 U.S.C. § 3101(d). Summarized succinctly, "ANILCA is generally concerned with the designation, disposition, and management of land for environmental preservation purposes." *Stratman v. Leisnoi, Inc.*, 545 F.3d 1161, 1165 (9th Cir. 2008). To this end, Congress "set aside approximately 105 million acres

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5. Many of Sturgeon's arguments resemble a facial challenge to NPS's general regulatory authority over nonfederal land within conservation system units. However, the district court's finding that Sturgeon had pleaded an as-applied challenge, *Sturgeon*, 2013 U.S. Dist. LEXIS 157078, 2013 WL 5888230, at *1, is not contested on appeal, and we therefore limit our consideration to the regulation as applied to Sturgeon.

of federal land in Alaska for protection of natural resource values by permanent federal ownership and management." *Nat'l Audubon Soc'y v. Hodel*, 606 F. Supp. 825, 827-28 (D. Alaska 1984). Portions of those lands were used to expand existing units of the National Park System and create new units, which were to be administered by the Secretary of the Interior. 16 U.S.C. § 410hh; *id.* § 410hh-1. Such units included national parks, preserves, and monuments. See 16 U.S.C. § 410hh; *id.* § 410hh-1. ANILCA refers to units of the National Park System situated in Alaska as "conservation system unit[s]" ("CSUs"). 16 U.S.C. § 3102(4).

Not all lands that lie within the boundaries of a CSU are owned by the federal government. Where possible, Congress drew unit boundaries "to include whole ecosystems and to follow natural features," and was thus cognizant of the fact that state, Native, or private-owned land could fall within the boundaries of CSUs. *Marsh*, 749 F.2d at 1417 (quoting 125 Cong. Rec. 9905 (1979)). The presence of both federal-owned and nonfederal-owned land lying within CSUs led Congress to clarify two things: first, what land would actually comprise the CSUs, and second, more generally, how land falling within a CSU's boundaries—whether federally owned or not—could be regulated. *See id.* (discussing the House version of ANILCA and the "Tsongas substitute" in the Senate).

Such clarification came in ANILCA § 103(c). The full text of that subsection reads as follows:

Appendix B

> Only those lands within the boundaries of any conservation system unit which are public lands (as such term is defined in this Act) shall be deemed to be included as a portion of such unit. No lands which, before, on, or after December 2, 1980, are conveyed to the State, to any Native Corporation, or to any private party shall be subject to the regulations applicable solely to public lands within such units. If the State, a Native Corporation, or other owner desires to convey any such lands, the Secretary may acquire such lands in accordance with applicable law (including this Act), and any such lands shall become part of the unit, and be administered accordingly.

16 U.S.C. § 3103(c).

Section 103(c) thus contains three separate instructions regarding the composition and regulation of CSUs. First, only "public lands" lying within the boundaries of a CSU are "deemed to be included as a portion of such unit." *Id.* Under ANILCA, "public lands" are "[f]ederal lands" (including "lands, waters, and interests therein") in which the United States holds title after December 2, 1980. *Id.* § 3102(1)-(3). The first sentence of § 103(c) makes clear that the boundaries of CSUs "do[] not in any way change the status of that State, native, or private land" lying within those boundaries. 125 Cong. Rec. 11158 (1979).

The second sentence of § 103(c) declares that state, Native, and private-owned land shall not be subject to

"regulations applicable solely to public lands within such units." 16 U.S.C. § 3103(c). Accordingly, under § 103(c)'s plain text, only public land lying within a CSU's boundaries may be subjected to *CSU-specific regulations*—nonfederal land is expressly made exempt from such regulations. As the 1979 Senate Report on ANILCA makes clear, nonfederal land would not be "subject to the management regulations which may be adopted to manage and administer any national [CSU] *which is adjacent to, or surrounds, the private or non-federal public lands.*" S. Rep. No. 96-413, at 303 (1979), *reprinted in* 1980 U.S.C.C.A.N. 5070, 5247 (emphasis added). Importantly for purposes of this case, in contrast to CSU-specific regulations, "[f]ederal laws and regulations of general applicability to both private and public lands" are "unaffected," and "would be applicable to private or non-federal public land holdings within [CSUs]." *Id.*

Finally, § 103(c)'s third sentence provides that the Secretary of the Interior may acquire nonfederal land lying within a CSU's boundaries; such land would then "become part of the unit" and may "be administered accordingly." 16 U.S.C. § 3103(c). Once acquired, what was previously nonfederal land would no longer be free from "regulations applicable solely to public lands within [CSUs]." *Id.*; *see also* 126 Cong. Rec. 21882 (1980) (noting that "if the [Native-]corporations ever decide to dispose of their property, [it] could become part of the [CSU]").

Appendix B

B.

With this background in mind, we easily resolve Sturgeon's appeal. Sturgeon argues that the plain language of ANILCA § 103(c) removes nonfederal lands from the reach of federal regulations promulgated to manage public lands. Thus, his argument goes, NPS may not enforce the hovercraft ban on the lower portion of the Nation River that falls within the Yukon-Charley because the water and submerged land of that river is owned by the state of Alaska.

While we agree with Sturgeon that § 103(c) is unambiguous, we find that it unambiguously forecloses his interpretation. The plain text of s§ 103(c) only exempts nonfederal land from "regulations applicable *solely* to public lands within [CSUs]." 16 U.S.C. § 3103(c) (emphasis added). The regulation at issue, banning hovercraft use in the Yukon-Charley, is not so limited.

In 1976, Congress vested the Secretary of the Interior with the authority to "[p]romulgate and enforce regulations concerning boating and other activities on or relating to waters located within areas of the National Park System, including waters subject to the jurisdiction of the United States." 16 U.S.C. § 1a-2(h). Pursuant to this grant of authority, the Secretary promulgated a number of regulations to "provide for the proper use, management, government, and protection of persons, property, and natural and cultural resources within areas under the jurisdiction of the National Park Service." 36 C.F.R. § 1.1(a). Within the chapter of the Code of Federal Regulations

containing those regulations, parts 1 through 5 "apply to all persons entering, using, visiting, or otherwise within" federally owned lands and waters administered by NPS and "[w]aters subject to the jurisdiction of the United States located within the boundaries of the National Park System, including navigable waters." 36 C.F.R. § 1.2(a)(1), (3). The hovercraft ban is located within part 2 of that chapter. *See* 36 C.F.R. § 2.17(e).

In short, then, the hovercraft ban is not one that "appli[es] solely to public lands within [CSUs]" in Alaska. 16 U.S.C. § 3103(c). Rather, this regulation applies to all federal-owned lands and waters administered by NPS nationwide, as well as all navigable waters lying within national parks. Thus, even assuming (without deciding) that the waters of and lands beneath the Nation River have been "conveyed to the State" for purposes of § 103(c), that subsection does not preclude the application and enforcement of the NPS regulation at issue. Because of its general applicability, the regulation may be enforced on both public and nonpublic lands alike within CSUs. Though Sturgeon might prefer a more robust regulatory exemption, we "must presume that a legislature says in a statute what it means and means in a statute what it says." *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 461-62, 122 S. Ct. 941, 151 L. Ed. 2d 908 (2002) (quoting *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54, 112 S. Ct. 1146, 117 L. Ed. 2d 391 (1992)).[6]

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6. Because we resolve this case based on the plain text of the statute, we need not address whether our decisions in *John v. United States (Katie John III)*, 720 F.3d 1214 (9th Cir. 2013), *John v. United States (Katie John II)*, 247 F.3d 1032 (9th Cir. 2001) (en

C.

Sturgeon acknowledges that § 103(c)'s language exempts nonfederal lands from regulations applicable "solely" to public lands, but argues that overreliance on the word "solely" leads to a result contrary to the express legislative purpose of restricting federal authority over nonfederal land within CSUs. "When confronted with a statute which is plain and unambiguous on its face, we ordinarily do not look to legislative history as a guide to its meaning." *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 184 n. 29, 98 S. Ct. 2279, 57 L. Ed. 2d 117 (1978); *see also Balen v. Holland Am. Line Inc.*, 583 F.3d 647, 653 (9th Cir. 2009) (quoting *North Dakota v. United States*, 460 U.S. 300, 312, 103 S. Ct. 1095, 75 L. Ed. 2d 77 (1983)) (internal quotation mark omitted) (stating that when statutory language is clear, its "language must ordinarily be regarded as conclusive"). But even if we consider the legislative history of ANILCA, we find no support for Sturgeon's claim. Rather, the legislative records from the House and Senate contain numerous statements supporting the plain language of the statute. The sponsor of § 103(c) in the House offered the view that his amendment "restate[d] and ma[de] clear" that nonfederal lands within CSUs would not be "subject to regulations which are applied to public lands which, in fact, are part of the unit." 125 Cong. Rec. 11158 (1979). The primary sponsor of ANILCA in the House declared that nonfederal land would not be constrained by "regulations applicable

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banc) (per curiam), or *State of Alaska v. Babbitt (Katie John I)*, 72 F.3d 698 (9th Cir. 1995) supply an alternative basis for affirming the district court.

to the public lands within the specific conservation system unit." 125 Cong. Rec. 9905 (1979). The House Concurrent Resolution that added § 103(c) to ANILCA specified that "only public lands (and not State or private lands) are to be subject to the [CSU] regulations applying to public lands." 126 Cong. Rec. 30498 (1980). Finally, the Senate Report notes that § 103(c) would exempt nonfederal land from "regulations which may be adopted to manage and administer any [CSU] which is adjacent to, or surrounds, the private or non-Federal public lands." S. Rep. No. 96-413, at 303 (1979), *reprinted in* 1980 U.S.C.C.A.N. 5070, 5247.[7] Rather than help Sturgeon, the legislative history confirms that ANILCA § 103(c) did not purport to exempt nonfederal lands within CSUs from generally applicable federal laws and regulations like the hovercraft ban.

D.

Next, Sturgeon argues that our decision in *City of Angoon v. Marsh*, 749 F.2d 1413 (9th Cir. 1984), supports his interpretation. Sturgeon's reliance on *Marsh*, however, is misplaced. *Marsh* involved the interaction between

7. Sturgeon also claims that until 1996, NPS did not purport to have regulatory authority over state-owned lands and waters within CSUs, but in July 1996, NPS reversed course. Even if so, NPS's current view comports with the text of the statute, and to the extent Sturgeon believes that NPS's purported change in position militates against deference, "[a]gency inconsistency is not a basis for declining to analyze the agency's interpretation under the Chevron framework." *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981, 125 S. Ct. 2688, 162 L. Ed. 2d 820 (2005).

two subsections of ANILCA § 503. The first, § 503(b), established the Admiralty Island National Monument, which was composed of 921,000 acres "of public lands." *Id.* at 1416 (emphasis omitted) (quoting ANILCA, Pub. L. No. 96-487, § 503(b), 94 Stat. 2371 (1980)). The second, § 503(d), stated that "[w]ithin the Monument[], the Secretary shall not permit the sale of [sic] harvesting of timber." *Id.*

Reading these two subsections in conjunction, we held that the district court erred in finding that "all lands within the boundaries of a National Forest System Monument"—including private lands—"come within the harvesting prohibition of section 503(d)." *Id.* (emphasis omitted). We pointed out that under § 503(b), the Admiralty Island National Monument, "by definition, consists solely of public or federally owned lands." *Id.* Thus, § 503(d)'s use of the phrase "[w]ithin the Monument" was inapplicable "to *private lands* which are within the boundaries of a national forest conservation system unit." *Id.* (emphasis added and omitted).

Marsh clearly is inapposite to the present dispute. First, *Marsh*'s discussion of § 103(c) is largely dicta because that subsection was inapplicable to the timber harvesting ban at issue. While ANILCA § 103(c) refers to "regulations applicable solely to public lands within such units," § 503(d) imposes a statutory prohibition against timber harvesting. At most, *Marsh* drew inferences from § 103(c) for the purpose of determining the reach of § 503(d). *See id.* at 1418 (noting that the court examined sections 102, 103(c), 503(d), and 506(c) "harmoniously" to determine Congressional intent regarding the ban

on timber harvesting). Second, *Marsh* offers little guidance in Sturgeon's case because, if promulgated as a regulation, § 503(d)'s ban on timber harvesting would fall under § 103(c)'s exception to the application of regulations applying solely to public lands, while NPS's hovercraft ban does not. Section 503(d) specifically refers to activities taking place "[w]ithin the Monument[]," and thus only limits conduct taking place on public lands within a specific CSU. For that reason, if promulgated as an agency regulation, its harvesting ban would qualify as a "regulation[] applicable solely to public lands within [CSUs]," and would be unenforceable on state, Native, or private-owned land under ANILCA § 103(c). As we noted above, NPS's hovercraft ban is not so constrained, and it applies to federally owned lands and waters administered by NPS nationwide, as well as navigable waters within national parks.

V.

We reject two additional arguments asserted by Sturgeon, that the Secretary of the Interior exceeded her statutory authority in promulgating the regulation at issue and that her action raises serious constitutional concerns.

A.

The 1976 Park Service Administration and Improvement Act ("1976 Act") grants the Secretary of the Interior broad authority over boating and water-related activities within the National Park System. That authorization provides as follows:

Appendix B

> [T]he Secretary of the Interior is authorized . . . [to] [p]romulgate and enforce regulations concerning boating and other activities on or relating to waters located within areas of the National Park System, including waters subject to the jurisdiction of the United States: *Provided*, That any regulations adopted pursuant to this subsection shall be complementary to, and not in derogation of, the authority of the United States Coast Guard to regulate the use of waters subject to the jurisdiction of the United States.

16 U.S.C. § 1a-2(h). Sturgeon contends that the latter portion of this subsection restricts the Secretary's regulatory power and does not permit her to regulate any and all activities on waters within national parks.

However, the plain text of the 1976 Act merely requires that any regulations promulgated by the Secretary *complement*, and not *derogate*, Coast Guard authority over waters subject to federal jurisdiction. It does not, as Sturgeon argues, limit the Secretary's regulatory authority to that enjoyed by the Coast Guard. The Oxford English Dictionary defines "complement" to mean "to supply what is wanting," 3 *Oxford English Dictionary* 610 (2d ed. 1989), and "derogate" to mean to "diminish," *id.* at 504. Thus, under the 1976 Act, the Secretary may regulate boating and other water-related activities taking place within the National Park System and its navigable

waters so long as those regulations supplement and do not diminish the Coast Guard's authority.[8]

Indeed, the legislative history of the 1976 Act makes this clear. The concern regarding the regulatory authority of the Coast Guard was first raised by the Secretary of the Interior in a letter to the House Committee on Interior and Insular Affairs.[9] H.R. Rep. No. 94-1569, at 13 (1976), *reprinted in* 1976 U.S.C.C.A.N. 4290, 4299. The Secretary noted that the Coast Guard possessed existing authority to "promulgate and enforce regulations for the promotion of *safety of life and property on* . . . waters subject to the jurisdiction of the United States." *Id.* (alteration in original) (emphasis added) (quoting 14 U.S.C. § 2(3)). Because many waters within the National Park System were navigable, the Secretary noted that his agency would "exercise authority concurrent with the Coast Guard in

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8. Moreover, ANILCA § 1319 provides that "[n]othing in [the statute] shall be construed as . . . superseding, modifying, or repealing, except as specifically set forth in this Act, existing laws applicable to the various Federal agencies which are authorized to . . . *exercise licensing or regulatory functions in relation thereto.*" 16 U.S.C. § 3207 (emphasis added).

9. The Secretary of Transportation also submitted a letter to the House Committee "strongly object[ing]" to the fact that the bill as drafted "would authorize the Secretary of the Interior to promulgate and enforce boating regulations which relate to construction, performance, and equipment standards"—responsibility for which had been previously delegated to "the Secretary of the department in which the Coast Guard is operating." H.R. Rep. No. 94-1569, at 24 (1976), *reprinted in* 1976 U.S.C.C.A.N. 4290, 4310.

many instances," and thus recommended an amendment clarifying that the bill's grant of regulatory authority would "not diminish the Coast Guard's authority under existing law to regulate boat design and safety." *Id.* The remainder of the bill would still, however, grant her the authority "to regulate *recreational, commercial and other uses and activities* relating to all waters of the National Park System." *Id.* (emphasis added).

The statute reflects just such a clarifying amendment. *See* 16 U.S.C. § 1a-2(h). Thus, both the plain text and the legislative history of the 1976 Act make clear that Sturgeon's argument that the Secretary of the Interior exceeded her statutory authority is without merit.

B.

Finally, Sturgeon contends that the Secretary's exercise of her regulatory authority under the 1976 Act implicates "serious constitutional concerns." Specifically, he raises the specter of potential violations of the Property and Commerce Clauses, though without offering any specifics as to how or why the NPS regulations contravene those clauses. We therefore decline to invalidate NPS's hovercraft ban on constitutional grounds because "[w]hatever the extent of the State's proprietary interest in [its] river[s], the pre-eminent authority to regulate the flow of navigable waters resides with the Federal Government." *New England Power Co. v. New Hampshire*, 455 U.S. 331, 338 n.6, 102 S. Ct. 1096, 71 L. Ed. 2d 188 (1982); *see also Alaska v. United States*, 545 U.S. 75, 116-17, 125 S. Ct. 2137, 162 L. Ed. 2d 57 (2005)

(Scalia, J., concurring in part and dissenting in part) ("If title to submerged lands passed to Alaska, the Federal Government would still retain significant authority to regulate activities in the waters of Glacier Bay by virtue of its dominant navigational servitude, other aspects of the Commerce Clause, and even the treaty power.").

VI.

We hold that even assuming that the waters of and lands beneath the Nation River have been "conveyed to the State" for purposes of ANILCA § 103(c), NPS's hovercraft ban is not a regulation that applies solely to public lands within CSUs in Alaska. Therefore, as to Sturgeon, we affirm the district court's grant of summary judgment in favor of the federal appellees. Because Alaska cannot establish standing on this record, we vacate the district court's judgment as to Alaska and remand with instructions that Alaska's action be dismissed for lack of subject matter jurisdiction.

AFFIRMED IN PART, VACATED AND REMANDED IN PART.

APPENDIX C — DECISION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA, FILED OCTOBER 30, 2013

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

JOHN STURGEON,

Plaintiff,

and

STATE OF ALASKA,

Plaintiff-Intervenor,

vs.

SUE MASICA, *et al.*,

Defendants.

No. 3:11-cv-0183-HRH

DECISION

I. Procedural History.

In this action brought pursuant to the Administrative Procedure Act, 5 U.S.C. §§ 701-06, plaintiff John Sturgeon and plaintiff-intervenor the State of Alaska bring "as applied" challenges to National Park Service ("NPS") regulations. Sturgeon and the State have timely filed their

opening summary judgment briefs,[1] to which defendants have responded.[2] Sturgeon and the State timely filed their reply briefs[3] and defendants[4] have timely filed their sur-reply[5] as contemplated by the court's scheduling order.[6] Oral argument has been heard.

On September 14, 2011, Sturgeon commenced this action. In Count I of his complaint, he seeks a declaration that the application of NPS regulations on lands belonging to the State of Alaska that are within NPS conservation system units created or expanded by the Alaska Native Lands Conservation Act (herein "ANILCA") are void as applied to him.[7] In Count II of his complaint, Sturgeon seeks a declaration that "any regulations purporting to authorize the NPS to enforce regulations which are solely applicable to public lands within conservation units on lands owned by the State of Alaska, including navigable waters, within NPS conservation units created or

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1. Docket Nos. 77 & 81.

2. Docket No. 84.

3. Docket Nos. 97 & 98.

4. Defendants are Sue Masica, Greg Dudgeon, Andee Sears, Jonathan Jarvis, the National Park Service, Sally Jewel, and the United States Department of the Interior.

5. Docket No. 101.

6. Docket No. 74 at 2.

7. Complaint for Declaratory Judgment and Injunctive Relief at 14-15, ¶ 46, Docket No. 1.

expanded by ANILCA are void."[8] In Count III, Sturgeon requests an order enjoining defendants "from interfering with [his] operation of his hovercraft on state-owned navigable waters within the Yukon-Charley" Rivers National Preserve (herein "Yukon-Charley").[9] In Count IV, he requests an order enjoining defendants "from enforcing NPS regulations, which are solely applicable to public lands within federal conservation system units, on lands belonging to the State of Alaska, including navigable waters, within the boundaries of NPS conservation units in Alaska that were created or expanded by ANILCA."[10]

In its second amended complaint in intervention,[11] the State asserted four claims for relief. The State's first claim for relief was a facial challenge to the regulations in question.[12] In its second claim for relief, the State seeks a declaration that the application and enforcement of 36 C. F. R § 1.2(a)(3) and § 13.2 violates § 103(c) of ANILCA.[13] In its third claim for relief, the State seeks a declaration that the Secretary's denial of the State's petition for rule-making was arbitrary and capricious.[14] In its fourth claim for relief, the State seeks injunctive relief prohibiting the

8. Id. at 16, ¶ 51.

9. Id. at 17, ¶ 55.

10. Id. at 18-19, ¶ 60.

11. Docket No. 45.

12. Id. at 15, ¶¶ 56-57.

13. Id. at 15, ¶¶ 58-59.

14. Id. at 15, ¶¶ 60-63.

application and enforcement of the regulations in question on State-owned lands and waters.[15]

By order of September 19, 2012,[16] the court rejected the State's first claim for relief which was a facial challenge to the NPS regulations at issue here because that claim was time-barred. Defendants now contend that both Sturgeon and the State are in fact bringing facial challenges in the guise of an "as-applied" challenge. Sturgeon and the State have pled as-applied challenges. The facts upon which Sturgeon and the State rely demonstrate application of NPS regulations to the respective activities of Sturgeon and the State. The court will address the as-applied claims.

In their briefing to the court, the State and defendants briefly discuss whether or not the State is challenging 36 C. F. R. § 13.2.[17] The court finds no evidence in the record that the defendants applied 36 C. F. R. § 13.2 to the State. As discussed hereinafter, the principal issue here is the applicability of 36 C. F. R. § 1.2 (which regulation addresses the applicability of Title 36, Part 2, as well as 36 C. F. R. Part 13 regulations) to the conduct of Sturgeon and the State.

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15. Id. at 15, ¶¶ 64-65.

16. Docket No. 53.

17. 36 C. F. R. § 13.2 addresses the applicability and scope of the Part 13 regulations which have application to NPS units in Alaska.

Appendix C

II. Statutory/Regulatory Background.

A. Alaska Native Claims Settlement Act.

In 1971, Congress enacted the Alaska Native Claims Settlement Act ("ANCSA") for purposes of addressing and resolving outstanding aboriginal claims of Native Alaskans which began to accrue in 1867 when the United States purchased Russian-America (Alaska). In addition to a monetary settlement and the conveyance of some 40 million acres of land to be divided amongst 220 Native villages and 12 regional corporations, ANCSA created the joint Federal-State Land Use Planning Commission for Alaska[18] and, by § 17(d)(2)(A), made provision for the withdrawal from public domain 80 million acres of unreserved public lands in Alaska for potential addition to or creation of new units of the national parks, forests, wildlife refuges, and wild and scenic river systems.[19]

B. Alaska National Interest Lands Conservation Act.

Based upon the work of the Commission, Congress in 1980 enacted ANILCA. In furtherance of the ANCSA § 17(d)(2)(A) withdrawals, Title II of ANILCA makes provision for the creation of or additions to the NPS. Section 201 established new "units of the National Park

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18. 43 U.S.C. § 1616. For convenience, we refer in the text of this discussion to ANCSA and ANILCA sections by statutory number, with parallel United States Code sections in a footnote.

19. 43 U.S.C. § 1616(d)(2)(A).

System [which] shall be administered by the Secretary under the laws governing the administration of such lands and under the provisions of this Act[.]"[20] Included as a new area was Yukon-Charley, "containing approximately one million seven hundred and thirteen thousand acres of public lands, as generally depicted on map numbered YUCH-90, 008[.]" § 201(10).[21] Section 201(10) expressly sets forth the purposes for this withdrawal, one of which was the maintenance of the environmental integrity of the Charley River Basin in its undeveloped, natural condition.

Section 202 of ANILCA[22] adds to existing NPS units.[23] Included by § 202(2)[24] is an addition to the Katmai National Monument[25] of 1,037,000 acres of public land, to be known as Katmai National Preserve ["Katmai"]. Katmai is to be administered to protect habitat, including fish populations, and to protect scenic geological, cultural, and recreational features. § 202(2).[26]

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20. 16 U.S.C. § 410hh.

21. 16 U.S.C. § 410hh(10).

22. 16 U.S.C. § 410hh-1.

23. 16 U.S.C. § 410hh-1.

24. 16 U.S.C. § 410hh-1(2).

25. Renamed Katmai National Park by § 202(2).

26. 16 U.S.C. § 410hh-1(2).

Appendix C

Included in Yukon-Charley are the lower reaches of the Nation River. Included in Katmai is the Alagnak River.[27]

For purposes of the implementation of ANILCA, that act contains definitions which are critical to understanding the act. The key terms are "land," "federal land," and, most important of all, "public lands." "Land" means "lands, waters, and interests therein." § 102(1).[28] "Federal land" means "lands the title to which is in the United States" after the date of enactment of ANILCA. § 102(2).[29] "Public lands" means "land situated in Alaska which, "after the date of enactment of ANILCA are Federal lands, except:

> land selections of the State of Alaska which have been tentatively approved or validly selected under the Alaska Statehood Act and lands which have been confirmed to, validly selected by, or granted to the Territory of Alaska of the State under any other provision of Federal Law.

§ 102(3)(A).[30] Finally, "conservation system unit" is defined to include the various NPS units addressed by ANILCA. § 102(4).[31] Yukon-Charley and Katmai are conservation system units for purposes of ANILCA.

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27. The Alagnak River is also designated by § 601(25) as a wild and scenic river within the NPS. 16 U.S.C. § 1274(a)(25).

28. 16 U.S.C. § 3102(1).

29. 16 U.S.C. § 3102(2).

30. 16 U.S.C. § 3102(3)(A).

31. 16 U.S.C. § 3102(4).

Collapsing the foregoing definitions for ease of discussion of the circumstances in this case, "public lands" are waters or interests in waters in Alaska owned by the United States in 1980. Excluded from public lands are interests in land and/or water confirmed or granted to the State of Alaska under any federal law.

Somewhat buried in the "maps" section of ANILCA is § 103(c)[32] which is at the heart of this litigation:

> Only those lands within the boundaries of any conservation system unit which are public lands (as such term is defined in this Act) shall be deemed to be included as a portion of such unit. No lands which, before, on, or after December 2, 1980, are conveyed to the State, to any Native Corporation, or to any private party shall be subject to the regulations applicable solely to public lands within such units. If the State, a Native Corporation or other owner desires to convey any such lands, the Secretary may acquire such lands in accordance with applicable law (including this Act), and any such lands shall become part of the unit, and be administered accordingly.

C. National Park Service Administration Improvement Act and Regulations.

In order to facilitate the administration of the national park system, the Secretary of the

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32. 16 U.S.C. § 3103(c).

> Interior is authorized, under such terms and conditions as he may deem advisable, to carry out the following activities:
>
> . . . .
>
> Promulgate and enforce regulations concerning boating and other activities on or relating to waters located within areas of the National Park System, including waters subject to the jurisdiction of the United States: Provided, That any regulations adopted pursuant to this subsection shall be complementary to, and not in derogation of, the authority of the United States Coast Guard to regulate the use of waters subject to the jurisdiction of the United States.

16 U.S.C. § 1a-2(h).

Relying upon and in furtherance of the above act, the Secretary of the Interior had adopted by 1997 the following general provision of Title 36 of the Code of Federal Regulations for areas administered by the NPS. Section 1.2[33] provides as follows:

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33. The parties have discussed at length the history of 36 C. F. R. § 1.2. Because this 1997 regulation is clear and unambiguous, and because the court has before it only as-applied challenges to the NPS regulations, there is no need to delve into the development of § 1.2. It is the interplay between § 1.2 and ANILCA § 103(c) which is critical to a disposition of this case.

Appendix C

Applicability and scope.

(a) The regulations contained in this chapter apply to all persons entering, using, visiting, or otherwise within:

(1) The boundaries of federally owned land sand waters administered by the National Park Service;

. . . .

(3) Waters subject to the jurisdiction of the United States located within the boundaries of the National Park System, including navigable waters and areas within their ordinary reach (up to the mean high water line in places subject to the ebb and flow of the tide and up to the ordinary high water mark in other places) and without regard to the ownership of submerged lands, tidelands, or low-lands;

. . . .

(5) Other lands and waters over which the United States holds a less-than-fee interest, to the extent necessary to fulfill the purpose of the National Park Service administered interest and compatible with the nonfederal interest.

(b) The regulations contained in parts 1 through 5, part 7, and part 13 of this chapter

> do not apply on non-federally owned lands and waters or on Indian tribal trust lands located within National Park System boundaries, except as provided in paragraph (a) or in regulations specifically written to be applicable on such lands and waters.

36 C. F. R. § 1.2(a), (b).

Summarizing the foregoing, subsections (a)(1) through (5) of § 1.2 apply to everyone going within the boundaries of all NPS administered lands in the United States. Navigable waters within the boundaries of such lands are subject to regulation, irrespective of ownership of submerged lands.[34]

The Secretary of the Interior has also promulgated 36 C. F. R. Part 13, containing regulations applicable to the NPS units in Alaska. Section 13.2(a) provides:

> The regulations contained in part 13 are prescribed for the proper use and management of park areas in Alaska and supplement the general regulations of this chapter. The general regulations contained in this chapter are applicable except as modified by part 13.

36 C. F. R. § 13.2(a). With respect to park areas, § 13.2(b) provides:

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34. For reasons explained hereinafter, the provisions of § 1.2(a)(5) do not come into play in this case.

Appendix C

> Subparts A through F contain regulations applicable to park areas. Such regulations amend in part the general regulations contained in this chapter. The regulations in subparts A through F govern use and management, including subsistence activities, within the park areas, except as modified by special park regulations in subparts H through V.

36 C. F. R. § 13.2(b).

In furtherance of his/her general administrative duties, the Secretary of the Interior has promulgated specific regulations which pertain to entries within the boundaries of NPS administered lands using hovercraft or helicopters. Title 36, Code of Federal Regulations, § 2.17(e), provides that "[t]he operation or use of hovercraft is prohibited." Section 2.17(a)(3) provides that the following is prohibited:

> Delivering or retrieving a person or object by parachute, helicopter, or other airborne means, except in emergencies involving public safety or serious property loss, or pursuant to the terms and conditions of a permit.

36 C. F. R. § 2.17(a)(3).

Part 2 regulations, including § 2.17(a)(3) and (e), are expressly subject to § 1.2(a), as provided by § 1.2(b). Part 13 regulations are also subject to § 1.2(a), as provided by § 1.2(b), except to the extent that Part 13 regulations

modify or amend the general regulations. Sturgeon and the State have not pointed to, and the court does not perceive there to be any amendment of the subparts A through F, Alaska-specific regulations with respect to park areas.[35] Therefore, the regulations specific to the use of helicopters and hovercraft have application within the boundaries of Yukon-Charley and Katmai, including the navigable waters of those NPS administered areas, **unless** Sturgeon and the State are correct in arguing that 36 C. F. R. § 1.2 (and therefore§§ 2.17(a)(3) and (e) and Part 13 as well) does not apply within the boundaries of Yukon-Charley and Katmai because of the provisions of ANILCA § 103(c).[36]

III. Factual Background.

Sturgeon's complaint and the State's second amended complaint in intervention focus upon their respective use of the Nation River and the Alagnak River. The lower reaches of the Nation River are within the boundaries of Yukon-Charley. The upper reaches of the Alagnak River are within the boundaries of Katmai. Both Yukon-Charley and Katmai are national parks created or expanded by ANILCA §§ 201 and 202. The Nation River arises in the

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35. There are, in subparts H and O, special regulations applicable to the Alagnak River as a wild river and to Katmai National Park and reserve. The Alagnak regulation has to do with bear viewing. 36 C. F. R. § 13.550. The subpart O regulations contain general provisions with respect to fishing, wildlife viewing, firearms, and the use of Lake Camp and Brooks Camp Developed Area. 36 C. F. R. §§ 13.1202-1242.

36. 16 U.S.C. § 3103(c).

Ogilvie Mountains of Yukon Territory, Canada, near the U. S. border, and flows in a southerly direction into Alaska and then into the northeastern quadrant of Yukon-Charley where it ultimately joins the Yukon River. The Alagnak River arises in the Aleutian Range south of Lake Iliamna and flows in a westerly direction through Katmai National Preserve. The Alagnak empties into Kvichak Bay, then into Bristol Bay.

It is undisputed that those portions of the Nation and Alagnak Rivers which are the subject of this litigation are within a conservation system unit as defined by § 102(4) and that both rivers have been determined to be navigable. Because the Nation and Alagnak Rivers are navigable, the State holds title to the lands under the navigable waters in trust for the people of Alaska, "that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein, freed from the obstruction or interference of private parties." Ill. Cent. R. Co. v. State of Ill., 146 U.S. 387, 452, 13 S. Ct. 110, 36 L. Ed. 1018 (1892); Alaska v. United States, 545 U. S. 75, 78-79, 125 S. Ct. 2137, 162 L. Ed. 2d 57 (2005).[37]

Sturgeon alleges that while he was on a moose hunting trip in 2007, the NPS informed him that he could not use

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37. "The common-law public trust doctrine has been incorporated into the constitution and statutes of Alaska." State, Dep't of Natural Resources v. Alaska Riverways, Inc., 232 P. 3d 1203, 1211 (Alaska 2010). "The people of the state have a constitutional right to free access to and use of the navigable or public water of the state" and "[t]he state has full power and control of all of the navigable or public water of the state, both meandered and unmeandered[.]" AS § 38. 05. 126(a), (b).

his small personal hovercraft on the Nation River within the boundaries of the Yukon-Charley. Sturgeon alleges that upon returning from his hunting trip, he had phone conversations and met with Andee Sears, a special agent for the NPS, who "reaffirmed the NPS's position that use of a hovercraft within the boundaries of the Yukon-Charley is a crime . . . and warned plaintiff that he would be criminally cited if he ever again operated the hovercraft within the Yukon-Charley".[38] In October 2010, Sturgeon petitioned the NPS "to engage in rule-making to repeal or amend NPS regulations so that the NPS would no longer assert the authority to restrict access on navigable waters located within the boundaries of park areas in Alaska."[39] Sturgeon received no response to his petition.[40] On July 26, 2011, Sturgeon sent a letter to the regional chief ranger of the Alaska district of the NPS, requesting that the chief ranger "confirm in writing whether I will be able to launch in the Yukon or the lower reaches of the Nation with my hovercraft so I can access that part of the Nation upriver from the Yukon-Charley boundary."[41] Sturgeon received no response to this letter.[42]

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38. Complaint for Declaratory Judgment and Injunctive Relief at 11, ¶ 36, Docket No. 1.

39. Id. at 12, ¶ 40; see also, Exhibit A, Complaint for Declaratory Judgment and Injunctive Relief, Docket No. 1.

40. Id. at 13.

41. Exhibit B at 2, Complaint for Declaratory Judgment and Injunctive Relief, Docket No. 1.

42. Complaint for Declaratory Judgment and Injunctive Relief at 13, ¶ 41, Docket No. 1.

Appendix C

In 2010, the Alaska Department of Fish and Game was required to apply to defendants for a scientific research and collecting permit to conduct genetic sampling on chum salmon in the Alagnak River.[43] "Access to State lands was to be by helicopter. . . ."[44]

On September 30, 2010, the State petitioned the Secretary of the Interior to repeal or amend § 1.2(a)(3) to make it in applicable to Alaska, with a corresponding repeal of the revisions to 36 C. F. R. § 13.2.[45] The petition was denied on January 13, 2012.[46]

IV. Jurisdiction.

The parties disagree as to whether Sturgeon and the State have standing to bring their as-applied regulatory claims with respect to the Kobuk and Yukon Rivers.[47] Sturgeon mentions the Yukon River in his complaint, but he has not asserted any separate claim based upon the Yukon River; and the NPS regulations that Sturgeon is challenging were applied to him with respect to his use of

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43. Second Amended Complaint in Intervention [etc.] at 12, ¶ 2b, Docket No. 45.

44. Id. at 13.

45. Id. at 11, ¶ 44.

46. Id. at 11, ¶ 46.

47. Defendants concede that this court has jurisdiction over Sturgeon's claims based on the Nation River and the State's claims based on the Alagnak River. Defendants' Sur-Reply on Motions for Summary Judgment at 4, Docket No. 101.

a hover-craft on the Nation River within Yukon-Charley. Similarly, the State never pled any factual allegations relating to its access to the Kobuk National Park. The court therefore concludes that it is defendants' application of 36 C. F. R. § 1.2 and the related Part 2 regulations to Sturgeon and the State with respect to their operations on the Nation and Alagnak Rivers which is before the court. Claims as to the Kobuk and Yukon Rivers have not been put before the court.

V. Standard of Review.

"Summary judgment is a suitable vehicle for resolution of a challenge to agency action under the Administrative Procedure Act. . . ." Western Watersheds Project v. Salazar, 766 F. Supp. 2d 1095, 1104 (D. Mont. 2011) (citing Nw. Motorcycle Ass'n v. United States Dep't of Agric., 18 F. 3d 1468, 1471-72 (9th Cir. 1994)). "However, unlike the typical civil summary judgment resolution, the [c]ourt does not make findings of fact or determine the existence of genuine issues of material fact." Id. "The [c]ourt must instead review the Administrative Record that was before the federal agency at the time it made its decision to determine whether the record supports the agency's decision. . . ." Id.

"'Because this case involves an administrative agency's construction of a statute that it administers, [the court's] analysis is governed by Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U. S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694. . . .'" Rodriguez v. Smith, 541 F.3d 1180, 1183 (9th Cir. 2008) (quoting Mujahid v.

Daniels, 413 F.3d 991, 997 (9th Cir. 2005)). "Under the Chevron framework" the court "must 'first determine[] if Congress has directly spoken to the precise question at issue, in such a way that the intent of Congress is clear.'" Id. at 1184 (quoting Mujahid, 413 F. 3d at 997). "'If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.'" Id. (quoting Chevron, 467 U. S. at 842-43). "'[I]f the statute is silent or ambiguous with respect to the specific issue,' the court moves to step two of the Chevron inquiry, and considers 'whether the agency's answer is based on a permissible construction of the statute.'" Blandino-Medina v. Holder, 712 F. 3d 1338, 1343 (9th Cir. 2013) (quoting Chevron, 467 U. S. at 843).

VI. Discussion.

Sturgeon and the State argue that the NPS general regulations may not be applied to them because of § 103(c) of ANILCA.[48] They point out that 36 C. F. R. § 1.2 purports to grant the NPS regulatory authority over state-owned navigable waters within the boundaries of Yukon-Charley and Katmai. They contend that § 103(c) of ANILCA forbids the NPS from exercising its regulatory authority over state-owned navigable waters within park boundaries in Alaska.

48. 16 U. S. C § 3103(c).

Appendix C

The first sentence of § 103(c) provides:

> Only those lands within the boundaries of any conservation system unit which are public lands (as such term is defined in this Act)shall be deemed to be included as a portion of such unit.[49]

It is clear beyond any room for discussion that the river beds and waters of the Alagnak and Nation Rivers are lands within the boundaries of Yukon-Charley and Katmai, both of which are ANILCA conservation system units. The first sentence of § 103(c) provides that only "public lands" are part of the respective conservation units (Yukon-Charley and Katmai). The State's submerged lands — the beds of the Nation River and the Alagnak River — are owned by the State, not the United States. The river beds are not included in — are not part of — conservation units Yukon-Charley or Katmai.

The State's submerged lands — the beds of the Nation River and the Alagnak River — are not the only interests to be addressed. For purposes of ANILCA, "land" means land or water or interests in them. The State owns "the natural resources within such lands and waters." 43 U.S.C. § 1311(a). The United States is entitled to regulate and improve navigation on navigable waters in furtherance of commerce. United States v. 32.42 Acres of Land in San Diego County, 683 F.3d 1030, 1037 (9th Cir. 2012). However, the federal government's rights as

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49. 16 U. S. C § 3103(c).

regards navigation is not an interest inland for purposes of ANILCA. Alaska v. Babbitt, 72 F. 3d 698, 702-03 (9th Cir. 1995) ("Katie John I").[50] The Katie John I decision stands for the further proposition that the United States may have reserved water rights with respect to navigable waters within ANILCA conservation units; and where such reserved water rights exist, the United States does own public land for purposes of ANILCA. Id. at 703-04. The State claims to "own" the waters of the Nation and Alagnak Rivers. Defendants contend that the United States owns reserved water rights in the Nation and Alagnak Rivers, thereby making the rivers "public lands" for purposes of ANILCA.

Each of the United States and the State have correlative rights with respect to navigable waters. But we need not decide here which if any of the correlative rights with respect to the navigable waters (as distinguished from submerged lands) of the Nation and Alagnak Rivers are owned by the State or the United States, or whether such interests are or are not public land. The principal issue in this case is whether or not 36 C. F. R. § 1.2(a) (and therefore also § 2.17 and Part 13) applies to the respective operations of Sturgeon and the State within the boundaries of Yukon-Charley and Katmai. The first sentence of § 103(c) does not address that issue.

The second sentence of § 103(c) does address the application of Title 36 regulations. It reads:

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50. Katie John I "remains controlling law" despite Katie John II, John v. United States, 720 F.3d 1214, 1226 (9th Cir. 2013).

Appendix C

> No lands which, before, on, or after December 2, 1980, are conveyed to the State, to any Native Corporation, or to any private party shall be subject to the regulations applicable solely to public lands within suchunits.[51]

The parties disagree as to whether the beds of the Nation and Alagnak Rivers, and such other rights as the State may own, were "conveyed to the State." The river beds were not transferred to the State by means of a deed or patent such as the federal government routinely uses in transferring selected lands from public domain to the State. Here, there is no evidence of a conveyance of river beds to the State. However, § 102(3)(A) of ANILCA expressly provides that "lands which have been confirmed to . . . or granted to the Territory of Alaska or the State under any other provision of Federal law" are excluded from "public lands."[52] The State acquired title to the beds of the Nation and Alagnak Rivers under the Statehood Act, Pub. L. No. 85-508, 72 Stat. 339 (1958), and the Submerged Lands Act, 43 U.S.C. §§ 1311-15. Because of the State ownership of the river beds, those river beds are not "public lands" for purposes of ANILCA. § 102(3).[53] However, the fact that the beds of the Nation and Alagnak Rivers are not public lands does not answer the question: "Does 36 C. F. R. § 1.2 and the underlying specific regulations of 36 C. F. R. Part 2 or Part 13 nevertheless

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51. 16 U.S.C. § 3103(c).

52. 16 U. S. C. § 3102(3)(A).

53. 16 U.S.C. § 3102(3).

have application to the activities of Sturgeon and the State within the boundaries of Yukon-Charley and Katmai?" On its face, § 1.2 has application to them because, on the facts of this case, both Sturgeon and the State entered and carried on activities "within. . . [t]he boundaries of federally owned lands and waters administered by the National Park Service. . . ." 36 C. F. R. § 1.2(a). Again, subsection (a) is applicable by the terms of 36 C. F. R. § 1.2(b), and application of § 1.2(a) does not depend upon ANILCA or the State's rights as to navigable waters.

Assuming for the sake of discussion that the beds of the Nation and Alagnak Rivers which the State owns by virtue of the Submerged Lands Act are deemed to have been "conveyed" to the State for purposes of § 103(c) of ANILCA,[54] the second sentence of § 103(c) is dispositive in this case. The regulations which § 103(c) excludes from application to State lands are those "regulations applicable solely to public lands within such units."[55] Title 36, C. F. R. § 1.2, and Part II of Title 36 (including § 2.17)were enacted by the Department of the Interior pursuant to its general authority to adopt regulations for all NPS administered lands and waters. None of those regulations was adopted "solely" to address entry upon or use of various equipment on public lands within ANILCA-created conservation units such as Yukon-Charley and Katmai.

There are regulations contained within Title 36 which have been adopted and are "applicable solely to public

54. 16 U.S.C. § 3103(c).

55. 16 U.S.C. § 3103(c).

lands within [ANILCA units]." 36 C. F. R. § 103(c).[56] Part 13 of Title 36 contains the regulations which are applicable to NPS units in Alaska, including Yukon-Charley and Katmai. The Part 13 regulations "supplement the general regulations. . . ." 36 C. F. R. § 13.2(a). Part 13 regulations might "modify" or "amend" general regulations applicable to park areas. 36 C. F. R. § 13.2(a) and (b). But Part 13 regulations have not altered or amended the helicopter or hovercraft regulations of § 2.17.

It is arguable that Part 13 regulations do not apply to state-owned submerged lands within Yukon-Charley and Katmai because of § 103(c).[57] But the regulations which expressly proscribe the use of hovercraft and helicopters within the boundaries of NPS administered lands are contained in Part 2 of Title 36, not Part 13. The regulations contained in Part 2, and in particular §§ 2.17(e) and 2.17(a)(3) are not regulations applicable solely to public lands within conservation system units. They are regulations of general application across the entirety of the NPS.

The foregoing disposes of Sturgeon's and the State's claims based upon NPS regulations. There remains the State's third claim for relief by which the State seeks review of the defendants' denial of its petition for rule-making. The State did not present any argument with respect to its third claim in its opening brief. Defendants contend that the claim has been abandoned. The State

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56. 16 U.S.C. § 3103(c).

57. 16 U.S.C. § 3103(c).

contends that it addressed this claim because, if the challenged regulations are invalid, then it was arbitrary and capricious of the defendants to deny the State's petition for rule-making. Inasmuch as defendants have prevailed with respect to the application of 36 C. F. R. § 1.2, it follows that the denial of the State's petition for rule-making was not arbitrary or capricious.

VII. Conclusion

The court concludes that 36 C. F. R. § 1.2(a), §§ 2.17(e) and 2.17(a)(3) were properly applied to the respective operations of Sturgeon and the State.

Sturgeon's complaint[58] is dismissed with prejudice. Intervenor the State of Alaska's second amended complaint[59] is dismissed with prejudice. The clerk of court shall enter judgment accordingly.

DATED at Anchorage, Alaska, this 30th day of October, 2013.

/s/ H. Russel Holland
United States District Judge

58. Docket No. 1.

59. Docket No. 45.

No. 14-1209

In the Supreme Court of the United States

JOHN STURGEON, PETITIONER

v.

SUE MASICA, IN HER OFFICIAL CAPACITY AS ALASKA REGIONAL DIRECTOR OF THE NATIONAL PARK SERVICE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether Section 103(c) of the Alaska National Interest Lands Conservation Act, 16 U.S.C. 3101 *et seq.*, abrogated the National Park Service's authority to regulate the use of hovercraft on all navigable waterways within the National Park System in Alaska.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 2
Argument 13
Conclusion 23

TABLE OF AUTHORITIES

Cases:

Chevron U.S.A. Inc. v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984) 9
City of Arlington, Tex. v. *Federal Commc'ns Comm'n*, 133 S. Ct. 1863 (2013) 19
John v. *United States*, 720 F.3d 1214 (9th Cir. 2013), cert. denied, 134 S. Ct. 1759 (2014) 15
National Ass'n of Home Builders v. *Defenders of Wildlife*, 551 U.S. 644 (2007) 19
National Cable & Telecomms. Ass'n v. *Brand X Internet Servs.*, 545 U.S. 967 (2005) 19
State of Alaska v. *Babbitt*, 72 F.3d 698 (9th Cir. 1995), cert. denied, 516 U.S. 1036 and 517 U.S. 1187 (1996) 16
United States v. *Twin City Power Co.*, 350 U.S. 222 (1956) 15
Whitman v. *American Trucking Ass'ns, Inc.*, 531 U.S. 457 (2001) 18

Constitution, statutes, regulations and rules:

U.S. Const. Art. I, § 8, Cl. 3 (Commerce Clause) 15
Act of Oct. 19, 1984, Pub. L. No. 98-506, § 2, 98 Stat. 2338 (16 U.S.C. 460*l*-22(c)) 3

Statutes, regulations and rules—Continued: Page

Act of Dec. 19, 2014, Pub. L. No. 113-287, 128 Stat. 3096 2
Alaska National Interest Lands Conservation Act, Pub. L. No. 96-487, 94 Stat. 2371, 16 U.S.C. 3101 *et seq.* 5
16 U.S.C. 3101(a) 5, 14
16 U.S.C. 3101(b) 5, 17
16 U.S.C. 3101(c) 5
16 U.S.C. 3101(d) 5
16 U.S.C. 3102(1)-(3) 7
16 U.S.C. 3102(1) 10, 15
16 U.S.C. 3102(2) 10, 15
16 U.S.C. 3102(3) 10, 15
16 U.S.C. 3102(4) 7
16 U.S.C. 3103(c) (§ 103(c)) ..... *passim*
16 U.S.C. 3121(b) 17
16 U.S.C. 3170 17
16 U.S.C. 3170(a) 20
16 U.S.C. 3201 ..... 17, 20
Alaska Statehood Act, Pub. L. No. 85-508, 72 Stat. 339 15
Mining Law of 1872, 30 U.S.C. 21 *et seq* 4
National Park Service Organic Act, 16 U.S.C. 1 *et seq.* 2
16 U.S.C. 1 2
16 U.S.C. 3 ..... 2, 14
National Park System General Authorities Act, Pub. L. No. 91-383, 84 Stat. 825, 16 U.S.C. 1a-1 *et seq.* 2
16 U.S.C. 1a-2(h) 2, 12, 14, 22
Submerged Lands Act, 43 U.S.C. 1311(a) 9, 15
16 U.S.C. 410hh(4)(a) 6, 18

Statutes, regulations and rules—Continued: Page

16 U.S.C. 410hh(7)(a) 6, 18
16 U.S.C. 410hh(10) 6, 7, 18
16 U.S.C. 410hh-1(1) 6, 18
16 U.S.C. 410hh-1(2) 6, 18
16 U.S.C. 410hh-2 ..... 7, 20
36 C.F.R.:
Pt. 1:
Section 1.1(b) 2
Section 1.2(a) 4
Section 1.2(a)(1) 3, 21
Section 1.2(a)(3) 3, 21
Section 1.2(a)(5) 3
Section 1.2(b) 3, 21
Pt. 2:
Section 2.1 4
Section 2.2 4
Section 2.3 4
Section 2.5 4
Section 2.14 4
Section 2.17(e) 4, 8
Pt. 3:
Sections 3.1-3.19 ..... 4, 20
Section 3.13 4
Pt. 6 3
Pt. 9 3
Section 9.1 4
Pt. 13 4
Section 13.2(a) 4
Pt. 242:
Section 242.3(c)(28) 15

Rules—Continued: Page

Section 242.4 15
Section 242.25(*l*) 20
Sup. Ct. R.:
Rule 10(a) 20
Rule 10(c) 20

Miscellaneous:

125 Cong. Rec. 11,158 (1979) 11
126 Cong. Rec. (1980):
p. 30,498 18
p. 31,108 19
48 Fed. Reg. 30,258 (June 30, 1983) 4
59 Fed. Reg. 65,949 (Dec. 22, 1994) 3
61 Fed. Reg. (July 5, 1996):
pp. 35,133-35,136 19
p. 35,135 19
64 Fed. Reg. (Jan. 8, 1999):
p. 1276 15
pp. 1279-1280 15

In the Supreme Court of the United States

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SUE MASICA, IN HER OFFICIAL CAPACITY AS ALASKA REGIONAL DIRECTOR OF THE NATIONAL PARK SERVICE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-34a) is reported at 768 F.3d 1066. The opinion of the district court (Pet. App. 35a-58a) is not published in the *Federal Supplement* but is available at 2013 WL 5888230.

JURISDICTION

The judgment of the court of appeals was entered on October 6, 2014. A petition for rehearing was denied on December 16, 2014 (Pet. App. 1a-2a). On February 20, 2015, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including March 31, 2015, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Congress established the National Park Service (NPS) through the National Park Service Organic Act (Organic Act), 16 U.S.C. 1 *et seq.* That Act directs NPS to "promote and regulate" the national parks in order to "conform to the fundamental purpose of the said parks, * * * which purpose is to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations." 16 U.S.C. 1; see 36 C.F.R. 1.1(b); see also National Park System General Authorities Act, Pub. L. No. 91-383, 84 Stat. 825, 16 U.S.C. 1a-1 *et seq.* The Organic Act authorizes the Secretary of the Interior to promulgate "such rules and regulations as he may deem necessary or proper for the use and management of the parks." 16 U.S.C. 3.[1]

A later enactment expressly provided that the Secretary may regulate activities on waters in the parks, authorizing the Secretary to "[p]romulgate and enforce regulations concerning boating and other activities on or relating to waters located within areas of the National Park System, including waters subject to the jurisdiction of the United States," so long as those regulations do not derogate the authority of the U.S. Coast Guard. 16 U.S.C. 1a-2(h).

Acting under those authorities, NPS has established rules for park lands and waters. Those regula-

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[1] The Act of Dec. 19, 2014, Pub. L. No. 113-287, 128 Stat. 3096, recodified statutory provisions relating to the National Park Service. Pursuant to that enactment, in future editions of the United States Code, National Park Service-related provisions will be located in Title 54.

tions apply to *federally owned* lands and waters in the national parks, and to navigable waters within national parks, but they do not generally apply to privately held, state-held, or Native-held land within park boundaries. Specifically, they apply within "[t]he boundaries of *federally owned* lands and waters administered by the National Park Service," and within the "[w]aters subject to the jurisdiction of the United States located within the boundaries of the National Park System, including navigable waters * * * without regard to the ownership of submerged lands, tidelands, or lowlands." 36 C.F.R. 1.2(a)(1) and (3) (emphasis added). In contrast, the regulations expressly state that they do not generally apply on "non-federally owned lands and waters or on Indian tribal trust lands located within National Park System boundaries." 36 C.F.R. 1.2(b). The regulations apply on private lands only if application is both "necessary to fulfill the purpose of the National Park Service administered interest and compatible with the non-federal interest," 36 C.F.R. 1.2(a)(5), or the regulation is "specifically written to be applicable on such lands," 36 C.F.R. 1.2(b).[2]

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[2] The only regulations promulgated by the Secretary that are applicable to privately held lands within park system units are certain regulations on mining and solid waste disposal, promulgated pursuant to distinct grants of statutory authority. Solid-waste disposal regulations at 36 C.F.R. Part 6 implement a statute directing the Secretary to promulgate regulations in order to ban "solid waste disposal sites" within units of the National Park System, see Act of Oct. 19, 1984, Pub. L. No. 98-506, § 2, 98 Stat. 2338 (16 U.S.C. 460*l*-22(c)); 59 Fed. Reg. 65,949 (Dec. 22, 1994). And regulations at 36 C.F.R. Part 9, which "control all activities within units of the National Park System resulting from the exercise of valid existing mining rights" acquired under federal mining

NPS has promulgated two types of regulations concerning these federally owned lands and navigable waters within national parks. The first type of regulation are regulations applicable in *all* national parks, except those specifically exempted. See 36 C.F.R. 1.2(a). Regulations in this category include rules to address pollution and sanitation, see, *e.g.*, 36 C.F.R. 2.14, 3.13, and rules concerning the introduction and removal of fish, plants, and wildlife, see, *e.g.*, 36 C.F.R. 2.1, 2.2, 2.3, 2.5. A section addressing boating and water use imposes safety, sanitation, and noise requirements for vessels on navigable waters within parks, and limits activities such as water skiing and snorkeling, see 36 C.F.R. 3.1-3.19. The rule at issue in this case—a rule barring "operation or use of hovercraft" on the parks' navigable waters, and on federally owned park lands—is a rule of this type. 36 C.F.R. 2.17(e).[3]

The second type of NPS regulation is limited to the publicly held lands and navigable waters within particular national parks. Part 13 of Title 36 of the Code of Federal Regulations contains the regulations applicable only to national park system units in Alaska—regulations that "supplement the general regulations" in those parks. 36 C.F.R. 13.2(a).

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laws, 36 C.F.R. 9.1, were promulgated pursuant to authorities including the Mining Law of 1872, 30 U.S.C. 21 *et seq.*

[3] "Hovercraft" are devices that are supported by fan-generated air cushions. NPS prohibited use of those devices in park areas in 1983, after determining that hovercraft, which "provide virtually unlimited access to park areas," would "introduce a mechanical mode of transportation into locations where the intrusion of motorized equipment by sight or sound is generally inappropriate." 48 Fed. Reg. 30,258 (June 30, 1983).

b. Congress enacted the Alaska National Interest Lands Conservation Act (ANILCA), Pub. L. No. 96-487, 94 Stat. 2371, 16 U.S.C. 3101 *et seq.*, for the purpose of preserving "certain lands and waters in the State of Alaska that contain nationally significant natural, scenic, historic, archeological, geological, scientific, wilderness, cultural, recreational, and wildlife values." 16 U.S.C. 3101(a). The statute declares that:

> It is the intent of Congress in this Act to preserve unrivaled scenic and geological values associated with natural landscapes; to provide for the maintenance of sound populations of, and habitat for, wildlife species of inestimable value to the citizens of Alaska and the Nation, including those species dependent on vast relatively undeveloped areas; to preserve in their natural state extensive unaltered arctic tundra, boreal forest, and coastal rainforest ecosystems; to protect the resources related to subsistence needs; to protect and preserve historic and archeological sites, rivers, and lands, and to preserve wilderness resource values and related recreational opportunities including but not limited to hiking, canoeing, fishing, and sport hunting, within large arctic and subarctic wildlands and on freeflowing rivers; and to maintain opportunities for scientific research and undisturbed ecosystems.

16 U.S.C. 3101(b).[4]

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[4] Congress stated as further objectives that it sought "to provide the opportunity for rural residents engaged in a subsistence way of life to continue to do so," 16 U.S.C. 3101(c), and to obviate the need for further legislation to protect lands in Alaska, 16 U.S.C. 3101(d).

ANILCA reserved about 105 million acres of federal land to be administered by NPS for those purposes. See Pet. App. 21a-22a. To do so, ANILCA expanded the boundaries of some of the national parks that had existed prior to ANILCA. Congress explained the purposes of each such expansion—typically including among them the protection of waterways. See, *e.g.*, 16 U.S.C. 410hh-1(1) (expanding Glacier Bay National Monument "[t]o protect a segment of the Alsek River, fish and wildlife habitats and migration routes"); 16 U.S.C. 410hh-1(2) (expanding Katmai National Monument "[t]o protect habitats for, and populations of, fish and wildlife" and "to maintain unimpaired the water habitat for significant salmon populations").

Other ANILCA provisions created new units of the National Park System. Each such provision specified the reasons for the unit's creation, with Congress again typically listing protection of fish and their habitats as one of its objectives. See, *e.g.*, 16 U.S.C. 410hh(7)(a) (creating Lake Clark National Park, for purposes including "[t]o protect the watershed necessary for perpetuation of the red salmon fishery in Bristol Bay"); 16 U.S.C. 410hh(4)(a) (creating Gates of the Arctic National Park, for purposes including "[t]o maintain * * * the natural environmental integrity and scenic beauty of * * * rivers, lakes, and other natural features" and "to protect habitat for and the populations of, fish"). The Yukon-Charley Rivers National Preserve (the Preserve), which includes the lower reaches of the Nation River and a portion of the Yukon River, was among the new park units created by ANILCA. 16 U.S.C. 410hh(10). Congress explained that its objectives in creating the Preserve

included "maintain[ing] the environmental integrity of the entire Charley River basin, including streams, lakes, and other natural features, in its undeveloped natural condition," as well as protecting populations of fish in the Preserve. *Ibid.*

ANILCA provided that the Secretary "shall administer the lands, waters, and interests therein added to existing areas or established by the foregoing sections of this subchapter as new areas of the National Park System," pursuant to the provisions of the Organic Act. 16 U.S.C. 410hh-2. The term "public lands" is used in ANILCA to refer to "lands, waters, or interests therein" which are held by the federal government. See 16 U.S.C. 3102(1)-(3).

ANILCA defined the term "conservation system units," or CSUs, to refer to specific types of public lands located in Alaska. 16 U.S.C. 3102(4) ("The term 'conservation system unit' means any unit in Alaska of the National Park System, National Wildlife Refuge System, National Wild and Scenic Rivers Systems, National Trails Systems, National Wilderness Preservation System, or a National Forest Monument."). Section 103(c) of ANILCA—a portion of a section entitled "Maps" that was added to the bill shortly before enactment—addresses the classification of land within CSUs that is privately held, state-held, or Native-held, and specifically exempts such land from "regulations applicable solely to public lands within such [conservation system] units." 16 U.S.C. 3103(c). The provision states in its entirety:

> Only those lands within the boundaries of any conservation system unit which are public lands (as such term is defined in this Act) shall be deemed to be included as a portion of such unit. No lands

> which, before, on, or after December 2, 1980, are conveyed to the State, to any Native Corporation, or to any private party shall be subject to the *regulations applicable solely to public lands within such units*. If the State, a Native Corporation, or other owner desires to convey any such lands, the Secretary may acquire such lands in accordance with applicable law (including this Act), and any such lands shall become part of the unit, and be administered accordingly.

Ibid. (emphasis added).

2. In 2007, NPS officers observed petitioner repairing a hovercraft inside the Preserve, on a gravel bar adjoining the Nation River. Pet. App. 8a. The officers advised petitioner that hovercraft cannot be operated in the Preserve, *ibid.*, in light of the regulation prohibiting "[t]he operation or use of hovercraft" on the federally-owned land and navigable waters in all national parks, 36 C.F.R. 2.17(e). Petitioner protested, but removed his hovercraft from the Preserve. Pet. App. 8a.

In 2011, petitioner brought this suit in the United States District Court for the District of Alaska, seeking declaratory and injunctive relief preventing NPS from enforcing its hovercraft rule against petitioner on the portions of the Nation River within the Preserve.[4] Pet. App. 9a. Petitioner invoked Section 103(c), which provides that "[n]o lands which * * * are conveyed to the State, to any Native Corporation,

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[4] Petitioner also sought injunctive and declaratory relief regarding NPS's ability to enforce the hovercraft rule to bar his use of a hovercraft on stretches of the Yukon River within national parks, but those claims were dismissed by the district court and petitioner did not appeal that dismissal. See Pet. App. 8a n.1.

or to any private party shall be subject to the regulations applicable solely to public lands within" CSUs, 16 U.S.C. 3103(c). See Compl. ¶¶ 22, 25, 49, 54, 58.

Petitioner claimed that all navigable rivers within national parks in Alaska were "state owned" lands because Alaska (like other States) generally owns *submerged lands* beneath navigable waterways in the State, see Submerged Lands Act, 43 U.S.C. 1311(a). See Compl. ¶¶ 22 & n.2, 25; Pet. App. 52a-53a. Petitioner asserted that, as a result, navigable rivers within national parks in Alaska were themselves state-owned, and NPS could not enforce rules on the navigable rivers within national parks in Alaska.[6] Compl. ¶¶ 22, 25; see Pet. App. 55a-57a.

The district court rejected petitioner's claims, granting summary judgment to respondents. Pet. App. 35a-58a. The court explained that the proper framework for adjudicating the dispute was that of *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), because the dispute involved a challenge to an administrative agency's construction of a statute that it administers. Pet. App. 51a-52a. The court found that petitioner's claim failed at the first step of the *Chevron* analysis, because petitioner's claim was foreclosed by the unam-

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[6] The State intervened and also sought to challenge NPS's enforcement of regulations on navigable rivers within national parks in Alaska, but the court of appeals ordered that the State's complaint be dismissed for lack of standing. See Pet. App. 9a-10a, 14a-20a. The court observed that Alaska had shown no actual injury. It "did not identify any actual conflict between NPS's regulations and its own statutes and regulations." *Id.* at 17a. Nor had it shown any way in which the regulations interfered with any ongoing state activity. *Id.* at 16a. The State has not sought review of that dismissal.

biguously expressed intent of Congress. *Id.* at 52a, 56a-57a.

At the outset, the district court noted that petitioner's claim under Section 103(c) of ANILCA rested on a highly contested premise—that navigable waters on rivers within the National Park System were not "public lands" for purposes of ANILCA. Pet. App. 52a-54a. The court noted that while Alaska owned the *submerged lands* under navigable rivers in the State, this did not mean that the United States lacked any interest in the waters of navigable rivers within the National Park System in Alaska. *Id.* at 54a; see 16 U.S.C. 3102(1), (2), and (3) (defining "public lands" to generally include federally-owned "lands, waters, and interests therein").

In any event, the district court concluded, the language of Section 103(c) of ANILCA foreclosed petitioner's claim, even if Alaska held full title to navigable rivers within the parks, unencumbered by any federal "interest" in those rivers' waters. Pet. App. 55a-57a. The court noted that Section 103(c) exempted lands that have been conveyed to private parties, the State, or Native Corporations from "regulations applicable solely to public lands within [conservation system] units." *Id.* at 55a (citation omitted). That provision did not bar NPS from enforcing its hovercraft rule on navigable waters within national parks in Alaska, the court explained, because the hovercraft rule is "not [a] regulation[] applicable solely to public lands within conservation system units" but is instead a "regulation[] of general application across the entirety of the NPS." *Id.* at 57a.

3. A unanimous panel of the court of appeals affirmed. Pet. App. 3a-34a. Like the district court, it

construed petitioner's claim as an "as-applied" challenge to the enforcement against petitioner of NPS's hovercraft regulation on the navigable waters of the Nation River within the Preserve. *Id.* at 21a n.5, 26a, 38a.

Like the district court, the court of appeals found petitioner's claim that ANILCA barred enforcement of the hovercraft regulation on navigable waters in the national parks to be "foreclosed by the plain text of the statute." Pet. App. 7a. The court of appeals began by discussing ANILCA Section 103(c) and its context. Section 103(c), it explained, addressed the status of privately held, state-held, and Native-held land that falls within the boundaries of CSUs by "clarify[ing] two things: first, what land would actually comprise the CSUs, and second, more generally, how land falling within a CSU's boundaries—whether federally owned or not—could be regulated." *Id.* at 22a.

The first sentence of Section 103(c), the court of appeals explained, clarified that "the boundaries of CSUs 'do[] not in any way change the status of that State, native, or private land' lying within those boundaries.'" Pet. App. 23a (brackets in original) (quoting 125 Cong. Rec. 11,158 (1979)). The third sentence provided a mechanism for the government to acquire new lands for CSUs. *Id.* at 24a. The remaining sentence—the second sentence—limited federal regulatory authority over privately held, state-held, and Native-held land within CSUs in Alaska, by specifying that such lands "shall not be subject to 'regulations applicable solely to public lands within such units.'" *Id.* at 23a-24a (quoting 16 U.S.C. 3103(c)).

The court of appeals "easily resolve[d]" petitioner's claim that this limitation barred NPS from enforcing nationwide park rules (such as the hovercraft rule) on all navigable rivers located within national park units in Alaska. Pet. App. 25a. At the outset, the court noted that Congress had expressly "vested the Secretary of the Interior with the authority to '[p]romulgate and enforce regulations concerning boating and other activities on or relating to waters located within areas of the National Park System, including waters subject to the jurisdiction of the United States." *Ibid.* (brackets in original) (quoting 16 U.S.C. 1a-2(h)). The court concluded that it was unambiguous that ANILCA Section 103(c) did not strip the Secretary of authority under this statute to promulgate rules applicable to navigable waters within areas of the National Park System in Alaska. Section 103(c)'s text "unambiguously foreclose[d] [petitioner's] interpretation," because it "only exempts nonfederal land from 'regulations applicable *solely* to public lands within [CSUs],'" *ibid.* (second set of brackets in original) (quoting 16 U.S.C. 3103(c)). "The regulation at issue" pertaining to hovercraft, the court explained, "is not so limited." *Ibid.* "Rather, this regulation applies to all federal-owned lands and waters administered by NPS nationwide, as well as all navigable waters lying within national parks." *Id.* at 26a.

The court of appeals noted that it ordinarily would not consider legislative history when, as in this case, the statutory text is clear. Pet. App. 27a. The court further noted that "the legislative records from the House and Senate contain numerous statements supporting the plain language of the statute." *Ibid.*; see *id.* at 26a-27a. Finally, the court rejected petitioner's

constitutional avoidance arguments, noting that federal laws regulating navigable waters—far from raising constitutional concerns—are an archetypal exercise of congressional power. *Id.* at 33a-34a (citing cases).

In light of that conclusion, the court of appeals noted it need not decide whether petitioner was correct to treat navigable waters within national parks as lands conveyed to the State for purposes of Section 103(c). Pet. App. 26a & n.6; see *id.* at 34a.

4. The court of appeals denied a petition for rehearing en banc, with no noted dissents and no judge of the court requesting a vote on the petition. Pet. App. 1a-2a.

ARGUMENT

Petitioner renews (Pet. 23-30) his challenge to NPS's enforcement of park rules prohibiting his use of a hovercraft on the navigable waters of the Nation River, within the boundaries of the Yukon-Charley Rivers National Preserve in Alaska. Every judge to consider petitioner's claim has correctly rejected it, and petitioner's claim does not implicate any disagreement among courts of appeals. Moreover, petitioner's claim that this dispute is one of such exceptional importance as to merit this Court's intervention in the absence of any disagreement rests on misunderstandings of NPS's regulations and of the decision below. Further review is not warranted.

1. The court of appeals correctly rejected petitioner's remarkable assertion that NPS cannot enforce any park regulations on the navigable waters within national parks in Alaska, by virtue of ANILCA Section 103(c). From the inception of the National Park System, the Secretary of the Interior has set rules for

navigable waters in national parks, in order to preserve those waters. See 16 U.S.C. 3 (Organic Act authorization to promulgate "such rules and regulations as" the Secretary "may deem necessary or proper for the use and management of the parks."). Congress confirmed this authority in 1970, when it expressly authorized the Secretary to "[p]romulgate and enforce regulations concerning boating and other activities on or relating to waters located within areas of the National Park System, including waters subject to the jurisdiction of the United States." 16 U.S.C. 1a-2(h); see Pet. App. 25a-26a (noting that hovercraft regulation is an exercise of that authority).

Petitioner does not dispute that those provisions ordinarily allow NPS to regulate activities "on or relating to waters located within areas of the National Park System," 16 U.S.C. 1a-2(h). See, *e.g.*, 11-cv-00183 Docket entry No. 77, at 18-19 & n.43 (Jan. 11, 2013) (Pet. Mot. For Summ. J.). Rather, he contends that a provision in ANILCA—a statute the principal objective of which was preserving additional "lands and waters" in Alaska, 16 U.S.C. 3101(a)—withdrew the Secretary's regulatory authority on all the navigable waters within national parks in Alaska, so that within national parks in Alaska (unlike national parks in every other part of the United States), the Secretary lacks the authority to protect rivers through generally applicable rules relating to wildlife and fishing, sanitation, boating, and similar topics.

As both courts below concluded, this argument is plainly without merit. See Pet. App. 25a ("[W]e easily resolve [petitioner's] appeal."); *id.* at 56a-57a (finding petitioner's claim foreclosed by unambiguous text at first step of *Chevron* analysis). Section 103(c) of

ANILCA clarifies the boundaries of CSUs, and then states that "[n]o lands which, before, on, or after December 2, 1980, are conveyed to the State, to any Native Corporation, or to any private party shall be subject to the regulations *applicable solely to public lands within such units*." 16 U.S.C. 3103(c) (emphasis added). That provision does not deny NPS the ability to enforce *nationwide* rules on the navigable waters of national parks in Alaska. As an initial matter, petitioner's assertion that the waters of navigable rivers are "lands * * * conveyed to" Alaska, *ibid.*, is incorrect. Petitioner based his claim on the Submerged Lands Act, 43 U.S.C. 1311(a), which generally gives States title to the submerged lands beneath their navigable waters, and the Alaska Statehood Act, Pub. L. No. 85-508, 72 Stat. 339; see Pet. 15. But those provisions do not mean that the United States lacks any interest in or authority over navigable waters in national parks. See 16 U.S.C. 3102(1), (2), and (3) (defining "public lands" to generally include federally-owned "lands, waters, and interests therein"). Not only does the United States retain "a dominant servitude" in navigable waters, grounded in the Commerce Clause, *United States* v. *Twin City Power Co.*, 350 U.S. 222, 224-225 (1956) (citations omitted), but it has reserved water rights in many navigable rivers within parks—including the waters at issue here. See *John* v. *United States*, 720 F.3d 1214 (9th Cir. 2013) (upholding regulations identifying reserved water rights, as relevant to ANILCA), cert. denied, 134 S. Ct. 1759 (2014); 64 Fed. Reg. 1276, 1279-1280 (Jan. 8, 1999) (specifying waters within Preserve as among those which are public lands, by virtue of reserved water rights); see 36 C.F.R. 242.4, 242.3(c)(28). Those re-

served rights are an "interest[]" in the waters for purposes of ANILCA. *State of Alaska* v. *Babbitt*, 72 F.3d 698, 703-704 (9th Cir. 1995) ("[W]e hold to be reasonable the federal agencies' conclusion that the definition of public lands [under ANILCA] includes those navigable waters in which the United States has an interest by virtue of the reserved water rights doctrine."), cert. denied, 516 U.S. 1036 and 517 U.S. 1187 (1996).

In any event, as both courts below agreed, ANILCA Section 103(c) would not support petitioner's challenge to the application of NPS's hovercraft regulation even if petitioner were correct in his premise that the United States lacks an interest in the navigable waters in national parks within Alaska. See Pet. App. 54a-56a ("[a]ssuming for the sake of discussion" petitioner's property premise, but rejecting petitioner's claim); *id.* at 26a & n.6 (same). Section 103(c) provides that lands within CSUs that are conveyed to the State may not be subjected to "regulations applicable solely to public lands within such units." 16 U.S.C. 3103(c). But as all agree, the rule prohibiting use of hovercraft in national parks is *not* a regulation "applicable solely to public lands within [conservation system] units," *ibid.* Rather, it is a nationwide NPS rule, and as petitioner acknowledges (Pet. 27-28), "nationwide NPS regulations are not 'solely' applicable to federal lands in Alaska." Accordingly, the "unambiguous" text forecloses petitioner's Section-103(c) challenge to the application of the hovercraft regulation on navigable waterways within a national park in Alaska. Pet. App. 25a.[7]

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[7] Petitioner identifies no ambiguity in any of the statutory terms here. He hypothesizes that "Congress inserted 'solely' into Sec-

Considerations of purpose and structure reinforce the meaning of the plain text. ANILCA sets out its purposes expressly. It is principally aimed at nature preservation—including the protection of rivers and of recreational activities such as "canoeing [and] fishing" on "freeflowing rivers." 16 U.S.C. 3101(b). Indeed, ANILCA contemplated that the Secretary would regulate the use of motorboats, see 16 U.S.C. 3121(b), 3170, and fishing, see 16 U.S.C. 3201, within CSUs. But petitioner reads this conservation statute as having forbidden NPS from regulating activities on any navigable waters within national parks in Alaska—making those waters far less protected than such waters anywhere else in the National Park System, where NPS undisputedly may enforce rules relating to sanitation, pollution, fishing, and similar concerns. Indeed, under petitioner's view, this congressionally-proclaimed conservation measure actually withdrew NPS's regulatory authority over the many navigable rivers in Alaska that were located in National Park System units long before ANILCA was enacted. That interpretation is not simply foreclosed by the text—it is completely dissonant with the statute's stated purposes.

Other provisions further highlight this incompatibility. ANILCA provisions designating particular areas as national parks state that they are intended to

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tion 103(c) to avoid inadvertently nullifying *all* federal statutes and regulations applicable to non-federal lands in Alaska." Pet. 28. But "solely" cannot naturally be understood to reach *both* regulations solely applicable to CSUs *and* certain types of other regulations. Had Congress wished to limit NPS's system-wide regulations, Congress could have done so—but that is not the line that Congress drew.

enable NPS to protect fish and their habitats in the newly created park areas. See, *e.g.*, 16 U.S.C. 410hh-1(1) and (2), 410hh(4)(a) and (7)(a). Thus, for example, Congress created the Preserve—the area at issue in this case—for purposes including "maintain[ing] the environmental integrity of the entire Charley River basin, including streams [and] lakes * * * in its undeveloped natural condition," as well as protecting the Preserve's fish population. 16 U.S.C. 410hh(10). It is implausible to suppose that while ANILCA was creating preserves for the protection of fish and their habitats, it was simultaneously stripping NPS of its powers to protect fish and their habitats in any navigable waterway in those same preserves.

Other statutory features bolster the conclusion that Section 103(c) did not withdraw NPS's authority over navigable waters within national parks in Alaska, stripping Alaskan rivers of the protections that navigable waters receive in national parks in every other State. First, there is ANILCA's structure: Because Congress does not "hide elephants in mouseholes," *Whitman* v. *American Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001), it is implausible that a directive of this significance to the statute as a whole would have been "buried" in "the 'maps' section of ANILCA," Pet. App. 42a. Second, there is the legislative history: No Member of Congress advanced the position that Section 103(c) stripped NPS of authority over all the navigable waters in Alaskan national parks—notwithstanding ANILCA's stated purposes of protecting those waters. On the contrary, Section 103(c) was described as a "minor revision[]" to "fine tune" the ANILCA bill. 126 Cong. Rec. 30,498 (1980)

(statement of Rep. Udall); see *id.* at 31,108 (statement of Sen. Stevens).

In any event, petitioner's challenge would fail under *Chevron* principles even if it were not unambiguously foreclosed. The Secretary is entitled to deference to reasonable interpretations of the scope of her authority under ANILCA. See *National Ass'n of Home Builders* v. *Defenders of Wildlife*, 551 U.S. 644, 666 (2007); *City of Arlington, Tex.* v. *Federal Commc'ns Comm'n*, 133 S. Ct. 1863, 1874 (2013); see also Pet. C.A. Br. 20 (acknowledging applicability of *Chevron* framework). For the reasons set forth above, at a bare minimum, Section 103(c) does not unambiguously strip NPS of the ability to regulate navigable waters within the national parks in Alaska. Because the Secretary has expressly rejected such an interpretation of Section 103(c) in regulations that were enacted following notice and comment, 61 Fed. Reg. 35,135 (July 5, 1996), and because the Secretary's interpretation of Section 103(c) is plainly reasonable, petitioner's claim would fail at step two of the *Chevron* analysis.[8]

2. Petitioner's challenge to the application of an NPS hovercraft regulation on navigable waters within the Preserve does not present a question that warrants this Court's intervention. The decision below does not conflict with any decision of this Court. See

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[8] NPS has been consistent in its treatment of navigable waters within national parks in Alaska. See 61 Fed. Reg. at 35,133-35,136 (explaining that changes in language of regulation were clarifications, designed to remove ambiguities in language). In any event, as the court of appeals noted (Pet. App. 28a n.7), the Secretary's view would be entitled to deference even if it reflected a change in position. See *National Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 981 (2005).

Sup. Ct. R. 10(a). And because no court in any jurisdiction has reached a conflicting decision, intervention is not required to maintain uniformity among federal courts (or between federal and state courts within Alaska). See *id.* 10(a) and (c).

This case does not involve a question so important that it should be decided by this Court in the absence of any disagreement. See Sup. Ct. R. 10(c). The question whether hovercraft may be operated on navigable waters within national parks' boundaries is not itself one of surpassing significance. And relatively few additional rules govern boating and water use in national parks—aimed at such objectives as safeguarding fish populations and water ecosystems, see generally 36 C.F.R. 3.1-.319.[9] The far-from-burdensome nature of these rules is exemplified by the State of Alaska's inability to identify any way in which the regulations either burden its activities or conflict with

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[9] Amicus State of Alaska suggests (Br. 2) that the decision below is one of exceptional importance because rural Alaskans "rely upon Alaska's unusual transportation thoroughfares to provide for their families." But ANILCA itself expressly addresses those needs, by protecting common means of transportation on these thoroughfares. 16 U.S.C. 3170(a) (stating that "the Secretary shall permit, on conservation system units * * * the use of snowmachines (during periods of adequate snow cover, or frozen river conditions in the case of wild and scenic rivers), motorboats, airplanes, and nonmotorized surface transportation methods for traditional activities (where such activities are permitted by this Act or other law) and for travel to and from villages and homesites"); cf. Alaska Amicus Br. 6 (noting that "[t]he primary means of transportation for rural Alaskans" are not hovercraft but "all-terrain vehicles; airplanes—generally regional, small bush plane, or private air service; snowmachines; and boats"). Similarly, ANILCA contains statutory protections of hunting, fishing, and subsistence-use activities. 16 U.S.C. 410hh-2, 3201; see 36 C.F.R. 242.25(*l*).

its own enactments. See Pet. App. 14a-20a; cf. Alaska Amicus Br. 17-18.

Petitioner and amici principally argue for review not because of these navigable-water rules themselves, but on the theory that the decision below subjects all privately held, state-held, and Native-held land within the National Park System to "plenary control of NPS, which prefers to use the Alaska wilderness strictly for conservation purposes." Pet. 19; see *ibid.* (asserting that ruling "concerns the regulatory disposition of more than 19 million acres of Alaskan land"); Pet. 20 (asserting that "Native Corporations will be foreclosed from developing roughly 30 percent of the land that Congress conveyed to them"); see also AHTNA Amicus Br. 5-9. But that argument fundamentally misunderstands both NPS's regulations and the decision below. It misunderstands NPS's regulations because, by their terms, NPS's rules apply only on "federally owned" lands and waters in national parks and on "navigable waters" in national parks, 36 C.F.R. 1.2(a)(1) and (3), and *not* on "non-federally owned lands and waters or on Indian tribal trust lands located within National Park System boundaries," except under the application of stringent criteria that NPS has almost never invoked, see 36 C.F.R. 1.2(b); note 1, *supra*. Thus, the decision allowing enforcement of NPS rules on navigable waters within park boundaries will not make NPS's rules applicable on privately held, state-held, or Native-held inholdings.

Petitioner's argument likewise reflects a misunderstanding of the decision below, which did not hold that the Secretary may enforce nationwide parks regulations on such privately held, state-held, or Native-held

lands in the future—if NPS dramatically shifts its regulatory approach. Any such regulation would have to rest on a grant of regulatory power. The decision below found an applicable grant in the water-specific statute that authorizes the Secretary to "[p]romulgate and enforce regulations concerning boating and other activities on or relating to waters located within areas of the National Park System, including waters subject to the jurisdiction of the United States." Pet. App. 25a (brackets in original) (quoting 16 U.S.C. 1a-2(h)). But the decision below does not establish that NPS would have authority, under any statute, to extend the gamut of parks regulations to privately held, state-held, and Native-held inholdings. Nor does it resolve the constitutional avoidance arguments that might be made concerning construction of those statutes, if NPS sought to regulate not navigable waters, but private inholdings. Cf. *id.* at 33a-34a (noting that regulation of navigable waters is a traditional federal power). In any event, this Court's intervention is not necessary based on hypothesized future exercises of NPS jurisdiction. Were NPS to shift its regulatory approach, and a court to find the new approach statutorily authorized, this Court could take up challenges to NPS's regulation of privately held, state-held, and Native-held lands under ANILCA Section 103(c) at that time. Petitioner's challenge to the application of the far more limited regulations in effect on navigable waters in national parks within Alaska does not present a question of exceptional importance.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 14-1209

IN THE

Supreme Court of the United States

JOHN STURGEON,

Petitioner,

v.

SUE MASICA, IN HER OFFICIAL CAPACITY AS ALASKA REGIONAL DIRECTOR OF THE NATIONAL PARK SERVICE, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF CITED AUTHORITIES ii

REPLY BRIEF 1

I. The National Park Service Offers No Basis For Declining Review Of A Case This Important To The People Of Alaska 2

II. The Ninth Circuit's Decision Is Unsustainable And Cannot Be Salvaged Based On Alternative Arguments 8

CONCLUSION 12

TABLE OF CITED AUTHORITIES

Page

CASES

Alvarado v. United States,
497 U.S. 543 (1990).....7

Chevron, U.S.A., Inc. v.
Natural Res. Def. Council, Inc.,
467 U.S. 837 (1984).....9

Circuit City Stores, Inc. v. Adams,
532 U.S. 105 (2001).....9

John v. United States,
720 F.3d 1214 (9th Cir. 2013).....11

Shelby Cnty., Ala. v. Holder,
133 S. Ct. 2612 (2013).....3

State of Alaska v. Babbitt,
72 F.3d 698 (9th Cir. 1995) 11

United States v. Alaska,
521 U.S. 1 (1997).....2

United States v. Alaska,
545 U.S. 75 (2005).....10

United States v. Alford,
274 U.S. 264 (1927).....11

Cited Authorities

Page

United States v. Haggar Apparel Co., 526 U.S. 380 (1999) 10

STATUTES AND OTHER AUTHORITIES

16 U.S.C. § 1302(1) 10

16 U.S.C. § 1302(3) 10

16 U.S.C. § 3103(c) 10

36 C.F.R. § 1.4(a) 3

36 C.F.R. § 2.17(a) 3, 4

36 C.F.R. § 4.10 3

36 C.F.R. § 5.3 3

61 Fed. Reg. 35,134 (1996) 10

Sup. Ct. R. 10(c) 2

Alaska Stat. Ann. § 38.05.126 2

S. Rep. No. 96-413 (1979) 8

REPLY BRIEF

The Ninth Circuit eviscerated the Alaska National Interest Lands Conservation Act's ("ANILCA") limitation on federal regulatory authority over non-federal lands in Alaska. In so doing, the court validated the National Park Service's ("NPS") regulation of all non-federal lands within the boundaries of Alaska national parks as though the federal government owned those lands when it is Alaska and its native peoples, in fact, who own them. As a result, vast swaths of Alaska—nearly 20 million acres of State and Native corporation land—are newly subject to intrusive federal regulation contrary not only to ANILCA, but to the Alaska Native Claims Settlement Act ("ANSCA") as well. Given how important these laws are to the people of Alaska, a Ninth Circuit ruling badly misinterpreting them warrants this Court's attention. Absent review from this Court, any future challenge to this extension of NPS authority will be permanently foreclosed.

NPS has offered no justification for declining review. The absence of a circuit split is irrelevant given that this Alaska-specific dispute is confined to the Ninth Circuit. The opposition thus boils down to two arguments, neither of which has merit. First, NPS claims the ruling is insignificant because it only reaches navigable waters. NPS made that argument below, but the Ninth Circuit instead ruled on the broadest possible grounds. The ruling must be evaluated on the actual basis for the judgment. Second, NPS argues that the ruling is correct or at least defensible on its alternative theories. But the decision is contrary to the text's plain meaning, is unreasonable, and cannot be salvaged based on arguments even the Ninth

Circuit bypassed. The Court should grant the petition.

I. The National Park Service Offers No Basis For Declining Review Of A Case This Important To The People Of Alaska.

It would be difficult to overstate how significant the disposition of the 20 million acres of land in dispute here is to Alaskans. Petition for Certiorari ("Pet.") 19-23. Yet NPS ignores the disposition of an acreage of land larger than eleven States and simply argues the Court should deny review because there is no conflict among the circuits and the judgment below is correct. Brief in Opposition ("BIO") 13. But there is no split because this case involves two statutes—ANILCA and ANCSA—specific to Alaska. Review is thus confined to the Ninth Circuit. The issue is whether the petition raises "an important question of federal law that has not been, but should be, settled by this Court." Sup Ct. R. 10(c). The petition meets that standard. The BIO's responses are not persuasive.

"Ownership of submerged lands—which carries with it the power to control navigation, fishing, and other public uses of water—is an essential attribute of sovereignty." *United States v. Alaska*, 521 U.S. 1, 5 (1997). That is the heart of this dispute. As the State's amicus brief explains, "Alaska has a direct and profound interest in maintaining its authority to keep its waterways open without federal regulatory interference, as Congress intended." Brief Amicus Curiae of Alaska ("Alaska Br.") 1. Since statehood, Alaska has possessed the authority to manage access to its navigable waters by watercraft and other vessels and, by constitutional and statutory authority, "holds and controls all navigable or public water in trust for the use of the people of the state." Alaska Stat. Ann. § 38.05.126.

NPS argues that Alaska cannot identify any sovereign interest the decision below impairs. BIO 20-21. But this very case is an example, as is the permitting requirement at issue in the State's companion case. Alaska Br. 17-18. Alaska's obligation to ask NPS for "permission" to use, or otherwise establish rules and regulations to govern the use of its land and water, is "a drastic departure from basic principles of federalism." *Shelby Cnty., Ala. v. Holder*, 133 S. Ct. 2612, 2618 (2013).

The State also identified other nationwide regulations that interfere with its sovereignty. 36 C.F.R. § 2.17(a) bans helicopter use, which would foreclose access to remote areas for scientific studies (among other things); 36 C.F.R. §§ 1.4(a) and 4.10 prevent use of all-terrain vehicles, an essential mode of transport on Alaska's isolated trails and winter ice highways; 36 C.F.R. § 5.3's commercial use restrictions would cripple commercial fishing, hunting, and tourism industries in and near Native villages. Alaska Br. 20-21. The fact that NPS has not yet imposed all of them in Alaska is not the point. The decision has granted NPS plenary authority to do so. These sovereignty implications alone warrant review.

This case also is vitally important to Alaska Natives. Brief Amicus Curiae of Ahtna Inc., *et. al.* ("Ahtna Br."); Brief Amicus Curiae of Arctic Slope Regional Corp. ("ASRC Br."). Under ANCSA, which settled claims between Alaska Natives and the United States, the Native corporations hold title to 18 million acres of land and water that the Ninth Circuit's ruling implicates. Ahtna Br. 5. In fact, the Ahtna group's brief, which was submitted on behalf of roughly 60,000 Native Alaskans, includes a map that is a sobering illustration of how dramatic an

effect the Ninth Circuit's decision has on the disposition of Native territory. The ruling makes "meaningful economic development impossible" and will scuttle ongoing "resource development projects on these lands, including mining and oil and gas projects on which millions of dollars have already been spent." *Id.* 1.

ASRC's amicus brief highlights the significance of this dispute for Native communities. "ASRC is owned by 12,000 Iñupiat Eskimo shareholders" and its "lands, including its inholdings within federal CSU's, have high potential for oil and gas development, other mineral development, tourism, and other economic uses. These acres are also critically important to ASRC's shareholder communities for village use and subsistence fishing and hunting." ASRC Br. 1-2. The ruling threatens "economic development" of their land and the "subsistence rights" of the Alaska Natives who live off of it. *Id.* 3.

The decision, moreover, injures hunters and Alaska's tourism industry. To the economic benefit of all Alaskans, sportsmen come from around the world to enjoy the Alaska wilderness. Yet the decision below, as this case illustrates, "threatens the ability of hunters and guides generally throughout Alaska to access hunting opportunities located both inside and outside the boundaries of CSUs managed by the NPS." Brief Amicus Curiae of Safari Club Int'l ("Safari Club Br.") 5. In particular, the Ninth Circuit's ruling jeopardizes the ability of sportsmen to use float planes to access remote regions of the State. *Id.* 6 (citing 36 C.F.R. § 2.17(a)). "Hunters need to be able to land float planes on the waters running through National Preserves to reach the bear, moose, caribou, sheep, goat and other species that Congress directed the NPS to make available

to them to hunt." *Id.* 8. The recreational and economic ramifications of inhibiting hunters' access to the Alaska wilderness are significant. *Id.* 9-14.

The case is personally important for Mr. Sturgeon too. It is no small thing to be threatened with federal prosecution by armed NPS officers for using a state-licensed hovercraft on state-owned lands. Pet. 15-16. Congressional deprivation of individual liberty is always a judicial concern; but when a federal agency seizes power Congress did not grant it, *infra* 9-11, the Court has shown special concern, Pet. 23.

NPS does not dispute any of these concerns about the sweep of the Ninth Circuit's ruling. It argues instead that they are not presented here because the decision is far narrower than Petitioner suggests. According to NPS, the court did *not* hold that "nationwide park regulations" can be imposed on "privately-held, state-held, or Native-held lands" physically located in Alaska's national parks. BIO 21-22. NPS contends that the Ninth Circuit held only that it may extend those regulations to "navigable waters" on those lands. *Id.* 22.

NPS's attempt to characterize the ruling as narrow is understandable, but has no foothold in the decision itself. To be sure, NPS below raised these alternative arguments, *viz.*, that federal statutory and constitutional power over navigable waters was sufficient to uphold the regulation, regardless of any limitation on its authority under Section 103 of ANILCA. BIO 15-16. But NPS fails to mention that the Ninth Circuit bypassed those arguments to reach the issue presented here. The court instead adopted the broadest possible holding, ruling that "*even*

assuming that the waters of and lands beneath the Nation River have been 'conveyed to the State' for purposes of ANILCA § 103(c), NPS's hovercraft ban is not a regulation that applies *solely to public lands within CSUs in Alaska.*" Pet. App. 26a (emphasis added).

Indeed, the court repeated the holding to ensure there was no confusion as to its breadth:

> [T]he hovercraft ban is not one that 'appli[es] solely to public lands within [CSUs]' in Alaska. 16 U.S.C. § 3103(c). Rather, this regulation applies to all federal-owned lands and waters administered by NPS nationwide, as well as all navigable waters lying within national parks. Thus, even assuming (without deciding) that the waters of and lands beneath the Nation River have been 'conveyed to the State' for purposes of § 103(c), that subsection does not preclude the application and enforcement of the NPS regulation at issue.

Id.

The Ninth Circuit thus was explicit in holding that Section 103 of ANILCA did not bar NPS from regulating non-federal lands in Alaska pursuant to any regulation that applied nationwide, *regardless of what interests the State and federal government may (or may not have) in navigable waters.* NPS should not be permitted to secure the benefit of a sweeping ruling, especially on an issue confined to the Ninth Circuit, by characterizing it as narrow based on alternative arguments bypassed below.

Indeed, NPS could have appropriately confessed error so that the court's broad holding would be vacated and the alternative arguments could be heard on remand. *See, e.g.*, *Alvarado v. United States*, 497 U.S. 543, 544 (1990). But it did not. The focus of this Court's attention, accordingly, must be the actual holding of the decision and its effect on Alaska. The holding's consequences are indisputable. The alternative arguments that NPS showcases here to avoid review will never need to be raised in the Ninth Circuit again. NPS now has the benefit of a sweeping rule that grants it plenary authority over *all* non-federal Alaska lands and waters.

NPS promises it will not exercise its newfound power unless it "dramatically shifts its regulatory approach." BIO 22. But that rings hollow. There is no longer any barrier preventing NPS from doing so. The regulated entities and individuals are all too aware that the federal government's enforcement priorities can shift more rapidly than they or the courts can anticipate. As explained above, the Ninth Circuit's ruling is already causing present harm. The decision means that the sovereignty and property rights the State and Native Alaskans held under ANILCA have been extinguished. As a consequence, the governing rule is deterring investment in and economic development of Native lands.

Finally, even if the decision were limited to navigable waters, it would solve nothing. Not only would it reflect an expansion of NPS authority far beyond what Congress has authorized or the Constitution would allow, *infra* 9-11, it would cause nearly all of the same harm. The ability of Alaskans to make productive use of their land depends on access to the waterways, and the waterways themselves

are economically vital to Alaska. Further, the hovercraft rule in dispute (and other water-centric regulations) harm hunters and other sportsmen. If this is the legal ground on which NPS defends the judgment, the Court's review is no less important.

II. The Ninth Circuit's Decision Is Unsustainable And Cannot Be Salvaged Based On Alternative Arguments.

The Ninth Circuit held that Section 103(c) of ANILCA is no barrier to imposing nationwide regulations on non-federal Alaska land because such regulations are not "solely" applicable to "public lands" in national parks. That interpretation of Section 103(c) cannot be defended. Pet. 23-30. NPS barely tries. NPS just reiterates the holding without explaining why it follows from the statutory text. BIO 16. Petitioner will not burden the Court by repeating arguments to which there has been no response.

The most NPS is willing to say in defense of the Ninth Circuit's textual analysis is that "'solely' cannot naturally be understood to reach *both* regulations solely applicable to CSUs *and* certain types of other regulations." BIO 16-17 n.7. But NPS misses the point. The function of "solely" in Section 103(c) is to keep NPS from regulating these lands and waters as if they were federally owned, while ensuring that federal statutes (and their implementing regulations) that apply across the board (such as the Clean Water Act) are not impaired. Pet. 28-29 (citing S. Rep. No. 96-413, at 303 (1979)). Under the Ninth Circuit's construction, Section 103(c) serves no discernible function since NPS can make *any* regulation applicable by giving it nationwide effect. This Court does not interpret statutes

in ways that make them "pointless." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 113 (2001). Unlike NPS's interpretation, Petitioner's reading gives meaning to each word of Section 103(c).

NPS counters that the Ninth Circuit's interpretation advances ANILCA's conservationist objective. BIO 17-18. Conservation was not, however, Congress's singular focus. ANILCA balances conservation and Alaska's economic and cultural needs. Pet. 8-11. NPS ignores the bargain the law struck. ANILCA's expansion of national parks (*i.e.*, the transfer of millions of acres of Alaska wilderness to the United States) achieved Congress's conservationist goals; fencing off the non-federal land and waters now physically located inside those newly-expanded parks from intrusive NPS oversight secured Alaska's interests. Only Petitioner's construction of Section 103(c) balances both goals.

NPS further contends that Congress would not have buried an important provision in ANILCA's maps section. BIO 18-19. But that too misses the point. Section 103(c) is in the maps section because it is part of an enactment that was redrawing maps that divide federal from non-federal land. The territory that Section 103(c) applies to is literally allocated in those maps. It also strains credulity for NPS to attack as "implausible" an interpretation that it held itself until 1996. Pet. 12-14.

NPS's reliance on agency deference also is mistaken. BIO 19. The regulation conflicts with the "unambiguously expressed intent of Congress." *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984). Deference also is inapplicable because the interpretation is

"unreasonable." *United States v. Haggar Apparel Co.*, 526 U.S. 380, 392 (1999). It would paradoxically prevent these non-federal lands from sharing in the numerous Alaska-specific exemptions from nationwide NPS regulations. Pet. at 29-30. These "relaxations of prohibitions contained in the general regulations," 61 Fed. Reg. at 35,134 (1996), by NPS's reasoning, could not be shared because they apply "*solely* to public lands within [conservation system] units." BIO 16 (quoting 16 U.S.C 3103(c)) (emphasis added). NPS does not even try to justify this absurd result. Any interpretation of Section 103(c) imposing all nationwide regulations on Native, State, and private Alaska lands—even those rules from which Alaska federal lands have been exempted—is facially unreasonable.

NPS is thus left with its alternative argument that, no matter what, it has plenary control over navigable waters. BIO 15-16. But there are good reasons why the Ninth Circuit bypassed this issue. NPS acknowledges that Alaska owns the land underneath the water. The Alaska Statehood Act of 1958 and the "Equal Footing Doctrine" required it. *United States v. Alaska*, 545 U.S. 75, 79 (2005). It is common ground, therefore, that these submerged lands are not "public lands" under ANILCA. 16 U.S.C. § 1302(3). NPS thus does *not* have a statutory "interest" in the waters. ANILCA defines "'land'" to mean "lands, waters, and interests therein." *Id.* § 1302(1). When Congress ceded title over submerged lands to Alaska, the navigable waters above them transferred too.

NPS's claim to "reserved water rights" is no stronger. BIO 15-16. At most, ANILCA grants the United States rights over navigable waters to ensure a "subsistence way of life for rural" Alaskans. *John v. United States*, 720 F.3d 1214, 1218 (9th Cir. 2013). But this case has nothing to do with subsistence issues, except of course that NPS's claim of plenary authority actually impairs the ability of rural Alaskans to live off their land. ASRC Br. 3 ("Most importantly to *amicus*, the Ninth Circuit's ruling threatens the economic development and subsistence rights of thousands of Alaska Native corporation shareholders on their privately-held ANCSA lands within ANILCA-created federal conservation system units.").

Finally, NPS's suggestion that the Constitution gives it sweeping power over navigable waters, even if ANILCA does not, provides no justification for declining review—it is additional reason to grant it. BIO 15. The only possible sources of authority would be the Property Clause and the Commerce Clause. Pet. 21-22. But the idea that hovercraft "imperil" adjacent federal land, which would be required to invoke the Property Clause, is untenable. *United States v. Alford*, 274 U.S. 264, 267 (1927). And Congress has not granted NPS *any* authority under the Commerce Clause to regulate these waters, let alone the kind of authority it exercised here. *State of Alaska v. Babbitt*, 72 F.3d 698, 703 (9th Cir. 1995) ("Neither the language nor the legislative history of ANILCA suggests that Congress intended to exercise its Commerce Clause powers over submerged lands and navigable Alaska waters.").

* * *

This important Ninth Circuit decision warrants the Court's attention. The ruling is as sweeping as it is wrong. The amicus briefs that all the stakeholders—the State, the Native corporations, and hunters—submitted confirm the case's significance. Recognizing the decision's weak footing, NPS relies almost entirely on alternative arguments. But the Court rarely declines to review a significant issue subject to exclusive review to one circuit on such grounds. The inquiry at this juncture is whether the actual basis for the Ninth Circuit's ruling, which has controlling force absent further review, raises an important federal issue that should be settled. It does.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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IN THE

Supreme Court of the United States

JOHN STURGEON,
Petitioner,

v.

BERT FROST, IN HIS OFFICIAL CAPACITY AS ALASKA REGIONAL DIRECTOR OF THE NATIONAL PARK SERVICE, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR UNITED STATES SENATORS SULLIVAN AND MURKOWSKI AND REPRESENTATIVE YOUNG AS AMICUS CURIAE IN SUPPORT OF PETITIONER JOHN STURGEON

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TABLE OF CONTENTS

INTEREST OF AMICUS CURIAE 1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

BACKGROUND 5

Statehood Act 6

ANCSA 10

ANILCA 12

Section 103 of ANILCA 16

ARGUMENT 19

I. SECTION 103 OF ANILCA CLEARLY PROHIBITS PARK SERVICE REGULATORY JURISDICTION OVER NON-FEDERAL LANDS AND WATERS 19

A. The Plain Text of Section 103(c) Does Not Authorize the Park Service to Regulate State and ANCSA Lands Within Conservation System Units 20

B. Nothing in Legislative History Supports the Ninth Circuit's Holding that Section 103(c) Authorizes the Park Service to Apply National Regulations to Nonfederal Lands. 23

C. Congressional Silence Regarding the Scope of Regulatory Jurisdiction Does Not Entitle Administrative Agencies To Deference. 24

II. EVEN IF *CHEVRON* STEP TWO GOVERNS, THE PARK SERVICE'S INTERPRETATION IS BASED ON AN IMPERMISSIBLE CONSTRUCTION OF THE STATUTE. 27

A. The Park Service's Construction of Section 103(c) Encroaches on Traditional State Power in Violation of Congressional Intent. 28

B. The Park Service's Construction of Section 103(c) Violates Commitments Made by Congress To Native Corporations. 31

CONCLUSION 33

TABLE OF AUTHORITIES

Page(s)

Cases

Amoco Prod. Co. v. Village of Gambell,
480 U.S. 531 (1987) 5, 6, 16, 21

Andrus v. Utah,
446 U.S. 500 (1980) 8

Barnhart v. Sigmon Coal Co.,
534 U.S. 438 (2002) 19, 20

Beecher v. Wetherby,
95 U.S. 517 (1877) 8, 29

Chamber of Commerce v. NLRB,
721 F.3d 152 (4th Cir. 2013) 25

Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.,
467 U.S. 837 (1984) ..... *passim*

City of Angoon v. Marsh,
749 F.2d 1413 (9th Cir. 1984) ..... *passim*

City of Saint Paul, Alaska v. Evans,
344 F.3d 1029 (9th Cir. 2003) 31

Dolan v. U.S. Postal Service,
546 U.S. 481 (2006) 6

TABLE OF AUTHORITIES—Continued

Edmonds v. Compagnie Generale Transatlantique,
443 U.S. 256 (1979) 31

FERC v. Mississippi,
456 U.S. 742 (1982) 28

Friends of the Earth v. EPA,
446 F.3d 140 (D.C. Cir. 2006) 26

Gonzales v. Oregon,
546 U.S. 243 (2006) 25

Hawaii v. Office of Hawaiian Affairs,
556 U.S. 163 (2009) 10, 29, 30

Hess v. Port Auth. Trans-Hudson Corp.,
513 U.S. 30 (1994) 28

John v. United States,
247 F.3d 1032 (9th Cir. 2001) 3

John v. United States,
720 F.3d 1214 (9th Cir. 2013) 3

King v. Burwell,
135 S. Ct. 2480 (2015) 20

Koniag, Inc. v. Koncor Forest Res.,
39 F.3d 991 (9th Cir. 1994) 11

TABLE OF AUTHORITIES—Continued

La. Pub. Serv. Comm'n v. FCC,
476 U.S. 355 (1986) 26

Metlakatla Indian Cmty., Annette Islands Reserve v. Egan,
369 U.S. 45 (1962) 6

NRDC v. EPA,
749 F.3d 1055 (D.C. Cir. 2014) 25

PUD No. 1 of Jefferson Cnty. v. Wash. Dept. of Ecology,
511 U.S. 700 (1994) 31

Ry. Labor Exec. Ass'n v. Nat'l Mediation Bd.,
29 F.3d 655 (D.C. Cir. 1994) 25, 26

Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs,
531 U.S. 159 (2001) 28

State of Alaska v. Ahtna, Inc.,
891 F.2d 1401 (9th Cir. 1989) 10

State of Alaska v. Babbitt,
72 F.3d 698 (9th Cir. 1995) 3

State v. Lewis,
559 P.2d 630 (Alaska 1977)..... 7

TABLE OF AUTHORITIES—Continued

Sturgeon v. Masica,
768 F.3d 1066 (9th Cir. 2014) 5, 23

Tarrant Reg'l Water Dist. v. Herrmann,
133 S. Ct. 2120 (2013) 28

Texas v. United States,
497 F.3d 491 (5th Cir. 2007) 25

Trustees for Alaska v. State,
736 P.2d 324 (Alaska 1987)..... 6, 7, 8, 30

United States v. Atl. Richfield Co.,
435 F. Supp. 1009 (D. Alaska 1977) 9, 11

United States v. Brown,
No. 94-30019, 1994 WL 16122537
(9th Cir. May 17, 1994) 18

Utah v. Andrus,
486 F. Supp. 995 (D. Utah 1979) 10

Util. Air Regulatory Grp. v. EPA,
134 S. Ct. 2427 (2014) 26

Watt v. Alaska,
451 U.S. 259 (1981) 6

Whitman v. Am. Trucking Ass'ns, Inc.,
531 U.S. 457 (2001) 20, 25

Wilderness Soc'y v. Griles,
824 F.2d 4 (D.C. Cir. 1987) 22

TABLE OF AUTHORITIES—Continued

Statutes and Constitutional Provisions

16 U.S.C. § 410hh-2 17

16 U.S.C. § 410hh-4 17

16 U.S.C. § 539d 18

16 U.S.C. § 3101(c) 22

16 U.S.C. § 3101(d) 14, 17, 22, 23

16 U.S.C. § 3102(1) 16, 23

16 U.S.C. § 3102(2) 16

16 U.S.C. § 3102(3) 16

16 U.S.C. § 3102(4) 12

16 U.S.C. § 3102(11) 16

16 U.S.C. § 3103 30

16 U.S.C. § 3103(c) 16, 21, 23

16 U.S.C. § 3111 ..... 22, 23

16 U.S.C. § 3111-14 ..... 23, 30

16 U.S.C. § 3117-19 ..... 23, 30

16 U.S.C. § 3121 17

TABLE OF AUTHORITIES—Continued

16 U.S.C. § 3126 22

16 U.S.C. § 3142(a)-(b) 18

16 U.S.C. § 3148 22

16 U.S.C. § 3150 22

16 U.S.C. § 3161 22

16 U.S.C. § 3170 17

16 U.S.C. § 3207(2) 22

16 U.S.C. § 3213(a) 15, 16

43 U.S.C. § 1601 31

43 U.S.C. § 1601(a) 11

43 U.S.C. § 1601(b) 11

43 U.S.C. § 1603 11

43 U.S.C. § 1605 11

43 U.S.C. § 1606(i) 12

43 U.S.C. § 1611 12

Alaska Const. art. VIII, § 1 9

Alaska Const. art. VIII, § 2 9

TABLE OF AUTHORITIES—Continued

Alaska Const. art. VIII, § 6 9

Alaska National Interest Lands Conservation Act ("ANILCA"), Pub. L. No. 96-487, 94 Stat. 2371 (1980). ..... *passim*

Alaska Native Claims Settlement Act, Pub. L. No. 92-203, 85 Stat. 688 (1971) ..... *passim*

Alaska Stat. §§ 38.04.005 - .015 9

Alaska Stat. § 44.99.100(a) 9

Alaska Stat. § 44.99.110 9

Alaska Statehood Act, Pub. L. No. 85-508, 72 Stat. 339 (1958) ..... *passim*

Submerged Lands Act of 1953, 67 Stat. 29 (1982) 9

Regulations

36 C.F.R. § 1.2(a)(3) 18, 27

General Provisions and Non-Federal Oil and Gas Rights, 80 Fed. Reg. 65,572 (Oct. 26, 2015) 30, 31

General Regulations for Areas Administered by the National Park Service and National Park System Units in Alaska, 61 Fed. Reg. 35,133 (July 5, 1996) 18

National Park System Units in Alaska, 46 Fed. Reg. 31,836 (June 17, 1981) 17, 18

Other Authorities

104 Cong. Rec. 12,035 (1958) 9

125 Cong. Rec. 11,158 (1979) 23

125 Cong. Rec. 11,457 (1979) 13

126 Cong. Rec. 30,498 (1980) 13, 22

158 Cong. Rec. 15811-15816 (2011) 10

S. Rep. No. 96-413 (1979) 13, 23, 24

Eric Todderud, *The Alaska Lands Act: A Delicate Balance Between Conservation and Development*, 8 Pub. Land L. Rev. 143 (1987) 2

James D. Linxwiler & Joseph J. Perkins, *A Primer on Alaska Lands*, 61 Rocky Mtn. Min. L. Inst. 7-1 (2015) 5, 13, 15, 17

TABLE OF AUTHORITIES—Continued

Statehood for Alaska: Hearings Before the Subcommittee on Territorial and Insular Affairs of the House Comm. on Interior and Insular Affairs, 85th Cong., 1st Sess. 201-02 (1957) 8

INTEREST OF AMICUS CURIAE[1]

Amici curiae United States Senators Dan Sullivan and Lisa Murkowski and Representative Don Young represent Alaska. Senator Murkowski is Chairman of the Senate Committee on Energy and Natural Resources, which has jurisdiction over federal public lands, including the National Parks. Senator Sullivan is a member of the Senate Committee on Environment and Public Works. Both committees provide legislative oversight of the Department of the Interior. Representative Young, the longest serving current member of the Alaska congressional delegation, served in Congress at the time of enactment of the Alaska National Interest Lands Conservation Act ("ANILCA"), Pub. L. No. 96-487, 94 Stat. 2371 (1980), 16 U.S.C. § 3101 et seq., the statute at issue in this case, and contributed to the passage of the bill.

Amici curiae thus are positioned to provide the Court with the background and history which facilitates the proper interpretation of Section 103(c) of ANILCA.

Additionally, amici curiae have a solemn and abiding interest in safeguarding the proper construction of the three landmark Acts which define the federal government's relationship to the State of Alaska, and the people of Alaska: the

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[1] No party or counsel for a party authored this brief in whole or in part. No party, counsel for a party or person other than amici curiae or their counsel made any monetary contribution intended to fund the preparation or submission of this brief. All parties have given their consent to this filing in letters that have been lodged with the Clerk.

Alaska Statehood Act, Alaska Native Claims Settlement Act, and ANILCA. To this end, amici curiae are committed to seeing that federal courts and agencies honor the commitments made in all three Acts and that federal agencies faithfully comply with the limits to their power imposed by Congress.

Finally, recent experience has shown that federal agencies, with alarming frequency, strain to find ambiguity in even the plainest words. Agencies then claim they are entitled to deference under *Chevron*[2] to support their interpretations of those words. In the end, the result is an expansion of agency authority far beyond that which Congress affirmatively delegated. When courts defer to implausible agency interpretations of statutory language, they are not only allowing the executive branch to increase federal authority unilaterally, they are undermining the separation of powers – the balance so carefully struck in the Constitution – and making it nearly impossible for Congress to effectively limit executive agency authority. That is what has happened in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

In a series of landmark Acts affecting Alaska lands, Congress carefully and deliberately balanced Alaska's interests with conservation concerns.[3] To

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[2] *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

[3] Eric Todderud, *The Alaska Lands Act: A Delicate Balance Between Conservation and Development*, 8 Pub. Land L. Rev. 143 (1987).

achieve this balance, Congress set out firm limits on federal authority to safeguard Alaska's sovereign right to manage its lands and to enable Alaska's Native peoples the opportunity to occupy, use and develop their aboriginal homeland. Not surprisingly the executive branch, feeling constrained by the limits Congress has placed on that authority, has pushed and tested the boundaries of its authority during much of Alaska's history. Agencies, after all, do what they regard as expedient and necessary, backing down only when the courts tell them they have overreached.

In this case, the National Park Service ("Park Service") misread Section 103(c) of ANILCA to expand its authority and promulgate regulations that ban the use of hovercrafts on State of Alaska lands located within a National Preserve.[4]

The Park Service's interpretation of Section 103 takes a provision that limits federal authority and transforms it into a wellspring of power over Alaska's lands and resources. Worse, over the last several years, the Park Service has improperly asserted the right to impose restrictions on all nonfederal lands located within conservation system units in Alaska.

Unfortunately, rather than limit federal agency power, two federal courts have endorsed this

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[4] Amici are not asking this Court to overturn or revisit the Ninth Circuit's "Katie John" subsistence decisions: *John v. United States* (Katie John III), 720 F.3d 1214 (9th Cir. 2013), *John v. United States* (Katie John II), 247 F.3d 1032 (9th Cir. 2001) (en banc) (per curiam), or *State of Alaska v. Babbitt* (Katie John I), 72 F.3d 698 (9th Cir. 1995).

unwarranted expansion of federal jurisdiction. The Ninth Circuit's opinion, in particular, will sow confusion and tempt the executive branch to continue eroding the line between the federal and state spheres in contravention of this Court's federalism jurisprudence.

The Ninth Circuit's decision should be vacated because it violates the plain meaning of Section 103(c) and subverts the intent of Congress. The purpose in Section 103(c) is to insulate nonfederal lands located within conservation system units from Park Service regulatory control. This provision therefore honors the commitments made by Congress to the State of Alaska and Native Corporations in prior legislation.

The Ninth Circuit's opinion, however, gives the Park Service, and other federal land management agencies, *carte blanche* to undermine authority expressly reserved by Congress to Alaska and Native Corporations. Had Congress intended to encroach on Alaska's sovereignty over land use, it would have said so affirmatively.

In short, the Park Service's unilateral expansion of its authority over Alaska's lands not only usurps Congress' legislative authority in violation of the separation of powers, it also comes at great expense to the State of Alaska. It is time for this Court to put to an end the federal government's long history of wrongfully seizing power over the State of Alaska's lands and resources to the detriment of the State's citizens, such as Mr. Sturgeon.

BACKGROUND

Contrary to the Park Service's claim, ANILCA is not just a statute designed to protect federal lands.[5] *See* Brief in Opposition ("BIO") at 5, 17; *Sturgeon v. Masica*, 768 F.3d 1066, 1075-76 (9th Cir. 2014). Rather, ANILCA serves as the final Act of Congress dealing with federal land disposal in Alaska. *See Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 549 (1987) ("ANILCA's primary purpose was to complete the allocation of federal lands in the State of Alaska, a process begun with the Statehood Act in 1958 and continued in 1971 in ANCSA."); *id.* at 550 & n.18 (citing H.R. Rep. No. 96-97, pt. 1, p. 135 (1979)). Because ANILCA is a direct outgrowth of the Alaska Statehood Act ("Statehood Act"[6]) and the Alaska Native Claims

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[5] *See* James D. Linxwiler & Joseph J. Perkins, *A Primer on Alaska Lands*, 61 Rocky Mtn. Min. L. Inst. 7-1–7-3 (2015), available at: www.rmmlf.org/AI61-Ch7.pdf.

> It would be a significant misstatement to describe ANILCA solely as a statute creating national parks, refuges, wilderness areas, and the like, *without recognizing that perhaps 75% of its content served its other purposes*. ANILCA embodies significant congressional compromise. ANILCA's massive conservation withdrawals *could not be enacted without an accommodation of Native and state needs*. For these reasons, ANILCA consists of a carefully crafted political balance between the creation of new or enlarged conservation system units (CSU) and the protection of Native, state, and other land uses on these lands and other lands.

Id. at 7-33-7-34. (emphasis added) (citations omitted).

[6] Pub. L. No. 85-508, 72 Stat. 339 (1958).

Settlement Act ("ANCSA"[7]), ANILCA cannot be read in isolation of the commitments made by Congress to the State of Alaska ("Alaska"), and to Alaskans, in these prior Acts.[8] *See Amoco*, 480 U.S. at 552-55. The ANILCA provision at the heart of this case, Section 103(c), must therefore be interpreted in light of the structure and purposes of the Statehood Act and ANCSA.

Statehood Act

Alaska's admission to the Union did not come easily. After Alaska's purchase in 1867, it took almost fifty years before it was organized as a federal territory, and it was not seriously considered as a candidate for statehood until after the Second World War. A desire to control Alaska's lands and resources became a coalescing force that motivated many to support the statehood effort. *See Metlakatla Indian Cmty., Annette Islands Reserve v. Egan*, 369 U.S. 45, 47 (1962).

Opponents to statehood raised several major objections, including Alaska's small population, narrow tax base, and the questionable financial means to govern itself. *Trustees for Alaska v. State*, 736 P.2d 324, 335-36 (Alaska 1987).

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[7] Pub. L. No. 92-203, 85 Stat. 688 (1971) (codified as amended at 43 U.S.C. §§ 1601-1629).

[8] Statutes should be interpreted in light of "any precedents or authorities that inform the analysis." *Dolan v. U.S. Postal Service*, 546 U.S. 481, 486 (2006); *Watt v. Alaska*, 451 U.S. 259, 266 (1981) ("The circumstances of the enactment of particular legislation may persuade a court that Congress did not intend words of common meaning to have their literal effect.").

To overcome these objections, advocates of statehood argued that Congress should convey significant lands to the new state in the hope that the lands would generate enough revenue so the State could govern itself. This argument won the day.

> That Congress recognized the financial burden awaiting the new state is clear from its debates. It is equally clear that the large statehood land grant and the grant of the underlying mineral estate were seen as important means by which the new state could meet that burden. Congress, then, granted Alaska the mineral estate with the intention that the revenue generated therefrom would help fund the new state's government.

Id. at 337.

Congress eventually agreed to admit Alaska into the Union on particular terms set out in the Statehood Act. *Id.* at 337. The Act's enactment, however, did not complete the statehood process; before Alaska could enter the Union, the Compact required ratification by the "State and its people." Statehood Act, § 8(b), 72 Stat. 344 (1958). Based on the promises embedded in the Statehood Act, Alaskans consented to Statehood on August 26, 1958, when they ratified the Compact.[9] *State v. Lewis*, 559 P.2d 630, 640 (Alaska 1977).

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[9] The State of Alaska was "admitted into the Union on an equal footing with the other States," and its boundaries were (continued...)

The centerpiece of the Compact between the State of Alaska and the United States is Alaska's right to select lands and manage these lands for the public's benefit.[10] *See Trustees for Alaska*, 736 P.2d at 335 ("The primary purpose of the statehood land grants contained in section 6(a) and (b) of the Statehood Act was to ensure the economic and social well-being of the new state.").[11] It was left to the

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defined as "all the territory, together with the territorial waters appurtenant thereto, now included in the Territory of Alaska." Statehood Act §§ 1, 2, 72 Stat. 339. Congress also made the Submerged Lands Act of 1953, 67 Stat. 29, as amended, 43 U. S. C. § 1301 *et seq.* (1982 ed. and Supp. III), applicable to the State. Statehood Act § 6(m), 72 Stat. 343.

[10] This Court has characterized the land grant provisions of statehood acts as a "'solemn agreement' which in some ways may be analogized to a contract between private parties," *Andrus v. Utah*, 446 U.S. 500, 507 (1980), and as "an unalterable condition of the admission, obligatory upon the United States." *Beecher v. Wetherby*, 95 U.S. 517, 523 (1877).

[11] Alaska Territorial Senator William Egan commented on future development of "known deposits of almost every type of mineral" as the source of future Alaskan income in response to Representative Miller's questions on whether Egan could "see where you would get much income out of this 103 million acres you might select around, bearing in mind most of the forests and good land has been set aside by the [federal] Government now, or by the military? How much income would you derive from that to begin with?" *Statehood for Alaska: Hearings Before the Subcommittee on Territorial and Insular Affairs of the House Comm. on Interior and Insular Affairs*, 85th Cong., 1st Sess. 201-02 (1957) (remarks of Rep. Miller and William Egan, Alaska Territorial Senator and President of the Alaska Constitutional Convention). *See also United States v. Atl. Richfield Co.*, 435 F. Supp. 1009, 1016 (D. Alaska 1977) ("The intent of Congress was, of course, to provide the new state with a solid economic foundation."); 104 Cong. Rec. 12,035 (1958) (continued...)

new state to make the most of its selection options and to fully utilize these lands in order to satisfy the State's budgetary obligations and the needs of Alaskans.

For these reasons, Alaska guards the rights conferred under the Statehood Act and views the management of its lands, and access to them, as an essential aspect of its sovereignty which sustains Alaska's economy, culture, and way of life.[12] Fidelity to the commitments made in the Statehood Act mandate that the State, Alaskans, and Alaska's congressional delegation must vigorously contest

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(statement of Senator Kuchel) ("[T]he State of Alaska will be able to make maximum use of the property which it will obtain under the bill from the Federal Government.").

[12] *See, e.g.*, Alaska Const. art. VIII, §§ 1, 2, 6; Alaska Stat. §§ 38.04.005 - .015 (setting out the State's land management policies); Alaska Stat. § 44.99.100(a) (declaring that the state economic development policy is to "further the goals of a sound economy, stable employment, and a desirable quality of life, the legislature declares that the state has a commitment to foster the economy of Alaska through purposeful development of the state's abundant natural resources and productive capacity.");

> The legislature, acting under art. VIII, sec. 1 of the Constitution of the State of Alaska, in an effort to further the economic development of the state, to maintain a sound economy and stable employment, and to encourage responsible economic development within the state for the benefit of present and future generations through the proper conservation and development of the abundant mineral resources within the state . . ."

Alaska Stat. § 44.99.110

any unwarranted expansion of federal jurisdiction that interferes with the use of and access to Alaska's lands and resources.[13] After all, the rights granted to the State of Alaska in the Statehood Act cannot – *and should not* – be unilaterally diminished or abrogated by a federal agency. *See Hawaii v. Office of Hawaiian Affairs*, 556 U.S. 163, 176 (2009) ("'[T]he consequences of admission are instantaneous, and it ignores the uniquely sovereign character of that event to suggest that subsequent events somehow can diminish what has already been bestowed'. And that proposition applies *a fortiori* where virtually all of the State's public lands . . . are at stake.") (quoting, in part, *Idaho v. United States*, 533 U.S. 262, 284 (2001) (Rehnquist, J. dissenting)); *see also State of Alaska v. Ahtna, Inc.*, 891 F.2d 1401, 1404, 1406 (9th Cir. 1989).[14]

ANCSA

In 1964 and 1965 the State selected, and the Secretary of the Interior tentatively approved, approximately 1,650,000 acres of land on the Arctic Slope. The State selected these lands because of reports of oil deposits. Drilling on state lands

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[13] *See* 158 Cong. Rec. 15811-15816 (2011) (remarks of Sen. Murkowski).

[14] Courts have also long-recognized that school lands legislation, which are analogous to statehood compacts, are to be construed liberally in favor of the recipient state. *Utah v. Andrus*, 486 F. Supp. 995, 1001-02 (D. Utah 1979) (citing *Wyoming v. United States*, 255 U.S. 489, 508 (1921)). This is "to place the new states on an 'equal footing' with the original thirteen colonies and to enable the state to [fund the schools]." *Id.* at 1002 (citing *Lassen v. Arizona Highway Dep't*, 385 U.S. 458, 463 (1967)).

shortly thereafter confirmed one of the largest oil fields ever discovered. After this discovery, in 1969, Alaska auctioned oil and gas leases on the State-selected Arctic Slope lands. The lease sale was vigorously protested. *Atl. Richfield Co.*, 435 F. Supp. at 1017-18.

Partly in response to the mounting protests, the Secretary of the Interior instituted a freeze, suspending federal patenting and approval of Alaska's selections pending a legislative settlement of the controversy. *Id.* at 1018. Because the administratively imposed freeze was a serious threat to Alaska's economy, Alaska turned to Congress for a solution. At that time, Native leaders had also concluded they should petition Congress for a prompt legislative settlement of their land claims.

Eventually, all interests obtained a legislative settlement that included substantial grants of land in addition to monetary compensation for the extinguishment of Native claims. *Koniag, Inc. v. Koncor Forest Res.*, 39 F.3d 991, 995-97 (9th Cir. 1994); *City of Angoon v. Marsh*, 749 F.2d 1413, 1414-15 (9th Cir. 1984). The express purpose of the Alaska Native Claims Settlement Act was to meet the "immediate need for a fair and just settlement of all claims by Natives and Native groups of Alaska, based on aboriginal land claims." 43 U.S.C. § 1601(a). Congress found that a settlement had to be accomplished "rapidly, with certainty, . . . [and] without litigation . . ." *Id.* at § 1601(b).

Key provisions of ANCSA include Section 4, which extinguished Native land claims. *Id.* at § 1603. As consideration for the extinguishment, Section 6 provides for a cash settlement of $962,500,000 to be paid over a period of years. *Id.* at

§ 1605. In addition to the monetary grant, ANCSA granted Alaska Natives fee title to more than 40 million acres of lands to be selected by Native villages and regional corporations from lands in Alaska withdrawn for that purpose. *Id.* at § 1611. All future revenues to be derived from the land patented to the Natives are the property of the Native corporations. *Id.* at § 1606(i).

ANCSA was unique in the realm of Native American land claim settlements because it vested control of the land directly in the elected representatives of Alaska's Native peoples, and not in the federal government as trustee. It was fully expected that some of this land would be developed for its vast natural resource potential.

ANILCA

The final chapter in the federal government's land allocation process occurred in 1980 when Congress enacted ANILCA and transferred over 100 million acres of federal lands in Alaska (an area larger than the State of California) into various conservation units, which precluded development on much of these lands.[15] The legislation followed several years of contentious debate over the proper use and disposition of federal lands in Alaska.

The most forceful concerns related to proposed legislation were raised by the Alaska delegation. Congressman Young objected that without adequate protections to limit federal jurisdiction over state

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[15] Under ANILCA, various federal agencies were tasked with managing national parks, wildlife refuges, wild and scenic rivers, national trails, and national monuments. 16 U.S.C. § 3102(4).

owned lands, the proposed legislation would violate the promises made by Congress to Alaska and Alaskans in the Statehood Act and ANCSA.[16]

The Alaska delegation was also extremely concerned that proposed amendments to the legislation would harm Alaska's economy and culture. As Congressman Young queried during one debate: "Can you imagine having to go out on the land you have been able to utilize for the last 300 years, you and your ancestors, and have some little person in a green uniform say, 'No, you cannot, you have to have a permit'?"[17]

Thus, to enact the legislation, the advocates of ANILCA had to be willing to accept a balance between conservation of federal lands and economic development of State and Native Corporation lands while also honoring the State of Alaska's sovereign right to manage its lands free of intrusive federal oversight.[18] This goal is reflected in the Act's "statement of purpose," which provides:

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[16] 125 Cong. Rec. 11,457 (1979) (Congressman Young argued that proposed amendments would deprive Alaskans of the promises made by Congress); S. Rep. No. 96-413, at 446 (1979) ("The bottom line of this situation is the denial of the full range of use of [State and Native] lands and hence, the *de facto* taking of property rights which have been granted to the State and to the Native corporations by the Alaska Statehood Act and by the Alaska Native Claims Settlement Act.").

[17] 125 Cong. Rec. 11,457 (1979).

[18] 126 Cong. Rec. 30,498 (1980); *see generally* James D. Linxwiler & Joseph J. Perkins, *A Primer on Alaska Lands*, 61 Rocky Mtn. Min. L. Inst. at 7-33-35.

> This Act provides *sufficient protection for the national interest in the scenic, natural, cultural and environmental values* on the public lands in Alaska, *and at the same time provides adequate opportunity for satisfaction of the economic and social needs of the State of Alaska* and its people; accordingly, the designation and disposition of the public lands in Alaska pursuant to this Act are found to represent a *proper balance between the reservation of national conservation system units and those public lands necessary and appropriate for more intensive use and disposition*[.]

16 U.S.C. § 3101(d)(emphasis added). To carry out this objective, ANILCA contains provisions designed to preserve the commitments made to the State of Alaska and Native Corporations in the Statehood Act and ANCSA.

For example, ANILCA provided that no further withdrawals would follow except through heavily circumscribed formal processes. This condition was set forth in what is commonly referred to as the "no-more" clause,[19] providing that no federal agency

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[19] This clause provides that,

> No future executive branch action which withdraws more than five thousand acres, in the aggregate, of public lands within the State of Alaska shall be effective except by compliance with this subsection. To the extent authorized by existing law, the President or the Secretary may withdraw public lands in the

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may take any action that "withdraws" additional public lands for preservation. 16 U.S.C. § 3213(a).

ANILCA contains many other provisions that were also intended to limit federal oversight of Alaska lands and Native Corporation lands and to ensure that Alaska's unique needs were honored by federal agencies. These provisions were deemed critical by Congress because the conservation system units created or enlarged by ANILCA – covering over 100 million acres of national parks, refuges, preserves, and monuments – surrounded 40 million acres of State and Native Corporation lands, which became islands within the federally managed conservation system units. *See* James D. Linxwiler & Joseph J. Perkins, *A Primer on Alaska Lands*, 61 Rocky Mtn. Min. L. Inst. at 7-33-35.

In addition to these protections, Section 103(c) is, perhaps, the most important provision in ANILCA from a federalism perspective because it (1) protects the nonfederal lands located within conservation units from federal oversight and (2) confirms the commitments made by Congress in the Statehood Act and ANCSA.

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> State of Alaska exceeding five thousand acres in the aggregate, which withdrawal shall not become effective until notice is provided in the Federal Register and to both Houses of Congress. Such withdrawal *shall* terminate unless Congress passes a joint resolution of approval within one year after the notice of such withdrawal has been submitted to Congress.

16 U.S.C. § 3213(a) (emphasis added).

Section 103(c) of ANILCA

In Section 103(c), Congress made clear that only "public lands" (*i.e.*, federal lands[20]) within the boundaries of conservation system units (*e.g.*, national parks) "shall be deemed to be included as a portion of such unit," and no lands owned by "the State, [a] Native Corporation, or [a] private party shall be subject to the regulations applicable solely to public lands within such units." 16 U.S.C. § 3103(c). Section 103(c) therefore provides that *only federal lands and waters* falling within conservation system unit boundaries are considered a part of the unit, thus excluding Alaska and Native Corporation lands from Park Service oversight. 16 U.S.C. §§ 3103(c), 3102(1)-(3), (11).

There are two primary reasons why this provision was added to ANILCA. *First*, Congress wanted to reinforce Alaska's and Native Corporations' right to manage their respective resources and lands, which necessarily includes access to lands conveyed under the Statehood Act and ANCSA.[21] *Second*, Congress understood that

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[20] Under ANILCA, "the term 'public lands' means land situated in Alaska which . . . are Federal lands." 16 U.S.C. § 3102(3). "The term 'Federal land' means lands the title to which is in the United States." 16 U.S.C. § 3102(2). And "[t]he term 'land' means lands, waters, and interests therein." 16 U.S.C. § 3102(1). In short, public lands are lands, waters, and interests therein, the title to which is in the United States. *Amoco Prod. Co.*, 480 U.S. at 548 n.15.

[21] ANILCA "provides adequate opportunity for satisfaction of the economic and social needs of the State of Alaska and its people." 16 U.S.C. § 3101(d). To this end, ANILCA protects mining operations, *see, e.g.*, 16 U.S.C. § 3170; promotes oil and

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Alaska is very different from other states and that its vast landscape, sparse population, subsistence lifestyles, and lack of infrastructure called for unique rules that would not apply to federal parks in the lower-48.[22]

For many years after ANILCA was enacted, the federal government, including the Park Service, understood well the limitations imposed by Congress in Section 103(c). For example, the Park Service restricted the applicability of its regulations to "'federally owned' lands . . . within park area boundaries." National Park System Units in Alaska, 46 Fed. Reg. 31,836, 31,843 (June 17, 1981) (citing 126 Cong. Rec. 11,115 (1980) and 126 Cong. Rec. 15,130-31 (1980)). The Park Service elaborated: "[t]hese regulations would not apply to activities

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gas development, *see, e.g.*, *id.* § 3142(a)-(b); and supports the Alaska timber industry, *see, e.g.*, *id.* § 539d. *See also Marsh*, 749 P.2d at 1418.

[22] For example, ANILCA grants special authorization for hunting in ANILCA national preserves, 16 U.S.C. § 410hh-2; it protects commercial fishing rights and related uses in designated ANILCA monuments and preserves, *id.* § 410hh-4; it allows commercial fishing and related uses within ANILCA National Wildlife Refuge System units, *id.*; and it explicitly permits traditional modes of surface transportation, including snowmobiles and motorboats, on ANILCA public lands for subsistence purposes, *id.* § 3121. In short, ANILCA recognizes that lands in Alaska must be managed differently from lands elsewhere, and the statute provides for this by imposing numerous specific restraints on federal authority over public and nonpublic lands. *See* James D. Linxwiler & Joseph J. Perkins, *A Primer on Alaska Lands*, 61 Rocky Mtn. Min. L. Inst. at 7-4, 7-33-35.

occurring on State lands. Similarly, these regulations would not apply to activities occurring on Native or any other non-federally owned land interests located inside park area boundaries." *Id.*

Given this history, it is not surprising that the Justice Department admitted that it could *not* prosecute an individual who had taken a seal from Alaskan waters for a ceremonial potlatch. *See* Brief of the United States, *United States v. Brown,* No. 94-30019, 1994 WL 16122537, at *5-6 (9th Cir. May 17, 1994) (Justice Department moved for dismissal because it concluded that the federal government neither "own[ed] the submerged land" nor had "legislative jurisdiction" over such lands).

Not satisfied with this limitation on its authority, the Park Service eventually circumvented ANILCA's restrictions on federal authority by issuing 36 C.F.R. § 1.2(a)(3), which is the regulation at the heart of this case. The Park Service declared "that NPS regulations otherwise applicable within the boundaries of a National Park System unit apply on and within waters subject to the jurisdiction of the United States located within that unit, including navigable waters and areas within their ordinary reach . . . irrespective of ownership of submerged lands, tidelands or lowlands, and jurisdictional status." General Regulations for Areas Administered by the National Park Service and National Park System Units in Alaska, 61 Fed. Reg. 35,133, 35,136 (July 5, 1996) (quoting 36 C.F.R. § 1.2(a(3)). In so doing, the Park Service's power grab expanded its jurisdiction over Alaska lands and resources in blatant disregard of the "balance" Congress struck in ANILCA.

ARGUMENT

The Park Service's regulation of nonfederal lands within conservation system units in Alaska violates the plain meaning of Section 103(c), disregards Congress' intent in ANILCA, ANCSA, and the Statehood Act, and offends a hallmark of federalism: State control over land use decision-making.

I. SECTION 103 OF ANILCA CLEARLY PROHIBITS PARK SERVICE REGULATORY JURISDICTION OVER NON-FEDERAL LANDS AND WATERS

According to the Park Service, the case should be resolved based on *Chevron* deference. To determine if an agency is entitled to deference, *Chevron* step one requires courts to examine "the language of the statute," and "[t]he inquiry ceases if the statutory language is unambiguous and the statutory scheme is coherent and consistent." *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002) (quotations omitted). When determining the meaning, the Court must look at how the words are used in the entire statutory scheme:

> [O]ftentimes the meaning—or ambiguity—of certain words or phrases may only become evident when placed in context. So when deciding whether the language is plain, the Court must read the words in their context and with a view to their place in the overall statutory scheme . . . Our duty, after all, is to construe statutes, not isolated provisions.

King v. Burwell, 135 S. Ct. 2480, 2483, 2489 (2015) (quotations and citations omitted)

Thus, the proper *Chevron* step one inquiry centers on whether Section 103(c), when construed in the context of ANILCA, grants the Park Service the authority to trample on Alaska's sovereignty and diminish the property rights of Native Corporations. *Cf.*, *Barnhart*, 534 U.S. at 442 ("The question presented is whether the Coal Act permits the Commissioner to [take specified action]"); *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001) ("[R]espondents must show a textual commitment of authority to the EPA[.]").

As explained by Sturgeon, ANILCA's text, purpose, structure, and legislative history conveys Congress' unmistakable intent to preclude the application of federal conservation regulations to State and private inholdings within conservation system units – *i.e.*, Congress specified in ANILCA that nonfederal lands within conservation system units are not subject to regulation as though they are part of the National Park System. Petitioner's Opening Brief at 21-30.

A. The Plain Text of Section 103(c) Does Not Authorize the Park Service to Regulate State and ANCSA Lands Within Conservation System Units.

Section 103(c) is clear and concise. It provides:

> Only those lands within the boundaries of any conservation system unit which are public lands (as such term is defined in this Act) shall be deemed to be included as a portion of such unit. No lands which, before, on, or after

> December 2, 1980, are conveyed to the State, to any Native Corporation, or to any private party shall be subject to the regulations applicable solely to public lands within such units. If the State, a Native Corporation, or other owner desires to convey any such lands, the Secretary may acquire such lands in accordance with applicable law (including this Act), and any such lands shall become part of the unit, and be administered accordingly.

16 U.S.C. § 3103(c).

The statute thus provides that: (1) only "public lands"[23] are part of conservation system units in Alaska; (2) federal land management agencies have no authority to exercise regulatory control over State, Native Corporation, and private lands located within those conservation system units; (3) the *only* lands that may be administered as part of the National Park System are those that have been conveyed to the United States; and (4) while the Park Service cannot regulate nonfederal lands within conservation system units, federal laws of general applicability, like the Clean Air Act or Clean Water Act, do apply to nonfederal lands *because those general laws are not* "applicable solely to public lands."

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[23] Public lands are lands, waters, and interests therein, the title to which is in the United States. *Amoco Prod. Co.*, 480 U.S.at 548 n.15.

This construction of Section 103(c) is supported by the purpose of ANILCA, which delegated certain responsibilities to federal land management agencies to conserve and protect federal lands while ensuring that nonfederal lands within conservation system units would not be managed by these same federal agencies as if they were federally owned.[24] *Marsh*, 749 F.2d at 1417 (observing that "the drafters of ANILCA never intended the mere location of boundary lines on maps delineating the overall conservation system to indicate that private lands . . . were to be treated as public lands").

The structure of ANILCA also supports this plain reading, as demonstrated by the fact that (1) ANILCA is a direct outgrowth of the Statehood Act and ANCSA; and (2) in ANILCA Congress sought to honor the commitments made to the State of Alaska and Native Corporations in the Statehood Act and ANCSA. *See, e.g.*, 16 U.S.C. §§ 3101(c)-(d); 3111, 3126, 3148, 3150, 3161, 3207(2); *cf.*, *Wilderness Soc'y v. Griles*, 824 F.2d 4, 7 (D.C. Cir. 1987) (observing that Alaska's "[n]avigable waters and their submerged lands are subject to state control in all cases"). In addition, to implement this commitment, numerous statutory provisions in ANILCA expressly prohibited federal agencies like the Park Service from adopting regulations that would interfere with Alaska's sovereign right to manage State lands for the economic and social needs of the State, and by expressly safeguarding

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[24] *See* 126 Cong. Rec. 30,498 (1980) (amending the bill to "[s]pecify[] that only public lands (and not State or private lands) are to be subject to the conservation system unit regulations applying to public lands").

Alaska's sovereign authority over nonfederal lands. *See* 16 U.S.C. §§ 3101(d), 3102(1), 3103(c), 3111-14, 3117-19.

B. Nothing in Legislative History Supports the Ninth Circuit's Holding that Section 103(c) Authorizes the Park Service to Apply National Regulations to Nonfederal Lands.

The Park Service, like the Ninth Circuit, may attempt to misrepresent legislative history to distort the plain meaning of the Section 103(c). *Sturgeon*, 768 F.3d at 1078-79. The Court should reject such an attempt because the legislative history is unequivocal: Congress' primary objective in adopting Section 103(c) was to prevent nonfederal lands newly-surrounded by conservation system units from Park Service oversight and regulation. *See Marsh*, 749 F.2d at 1417-18 ("section 103(c) was added to ANILCA . . . for the *express purpose* of 'specifying that *only public lands* (*and not State owned or private lands*) are to be subject to the conservation system unit regulations applying to public lands'") (quoting, in part, 126 Cong. Rec. 30,498) (emphasis added).

Section 103(c)'s House sponsor stated that he wanted to "make clear beyond any doubt that any State, Native, or private lands, which may lie within the outer boundaries of the conservation system unit are not parts of that unit and are not subject to regulations which are applied to public lands, which, in fact, are part of the unit." 125 Cong. Rec. 11,158 (1979); *see also* S. Rep. No. 96-413, at 303 (1979) ("Those private lands, and those public lands, owned by the State of Alaska . . . are not to be construed as subject to the management regulations

which may be adopted to manage and administer any national conservation system unit which is adjacent to, or surrounds, the private or non-Federal public lands.").

And while nonfederal lands located within conservation system units would not be subjected to any Park Service regulations, Congress also wanted to make clear that laws of general applicability *would apply* to such lands. S. Rep. No. 96-413, at 303 (1979) (suggesting that Section 103(c)'s use of "solely" was to clarify that "Federal laws and regulations of general applicability to both private and public lands, such as the Clean Air Act . . . would be applicable to private or non-Federal public land in holdings within [CSUs] . . . and thus are unaffected by the passage of the bill").

Accordingly, Congress did not grant the Park Service the authority to transform Section 103 (c) into a potent source of far-reaching regulatory authority over 40 millions of acres of State, Native, and private lands and resources located within conservation system units.

C. Congressional Silence Regarding the Scope of Regulatory Jurisdiction Does Not Entitle Administrative Agencies To Deference.

In its opposition to Sturgeon's Petition for Certiorari, the Park Service claims that the Court should disregard the plain meaning of Section 103(c) and grant it deference because Congress did not expressly forbid Park Service regulation of nonfederal lands within conservation units. BIO at 19.

By asserting authority to do whatever Congress did not explicitly forbid, the Park Service turns *Chevron* on its head. Were this Court to accept such a formulation and "*presume* a delegation of power absent an express *withholding* of such power, agencies would enjoy virtually limitless hegemony, a result plainly out of keeping with *Chevron* and quite likely with the Constitution as well." *Ry. Labor Exec. Ass'n v. Nat'l Mediation Bd.*, 29 F.3d 655, 671 (D.C. Cir. 1994) (*en banc*); *Chamber of Commerce v. NLRB*, 721 F.3d 152, 160 (4th Cir. 2013) ("we do not find that *Chevron*'s second step is implicated any time a statute does not expressly *negate* the existence of a claimed administrative power.") (emphasis in original) (quotation and citation omitted); *Texas v. United States*, 497 F.3d 491, 502 (5th Cir. 2007) (rejecting the federal appellees' argument that "congressional 'silence' creates an implicit delegation under *Chevron*").

Yet the Park Service blithely contends that "the Secretary is entitled to deference to reasonable interpretations of the scope of her authority under ANILCA." BIO at 19. But, again, agencies do not possess authorities beyond those conferred in the substantive provisions enacted by Congress. *See Gonzales v. Oregon*, 546 U.S. 243, 264-65 (2006) ("It would go . . . against the plain language of the text to treat a delegation for the 'execution' of [the Attorney General's] functions as a further delegation to define other functions well beyond the [statute's] specific grants of authority."); *Am. Trucking Ass'ns*, 531 U.S. at 468 (finding it "implausible that Congress would give to the EPA through . . . modest words the power to determine whether implementation costs should moderate national air quality standards."); *NRDC v. EPA*, 749

F.3d 1055, 1063 (D.C. Cir. 2014) ("we have consistently held that EPA's authority to issue ancillary regulations is not open-ended, particularly when there is statutory language on point.").

Further, to assert, as the Park Service does, that it has broad power to define the scope of its authority under ANILCA "is both flatly unfaithful to the principles of administrative law . . . and refuted by precedent." *Ry. Labor Exec. Ass'n*, 29 F.3d at 671. There should be no dispute that the Park Service "literally has no power to act . . . unless and until Congress confers power upon it." *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986); *see also Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2446 (2014) ("We reaffirm the core administrative-law principle that an agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate."); *Friends of the Earth v. EPA*, 446 F.3d 140, 145 (D.C. Cir. 2006) ("EPA may not avoid the Congressional intent clearly expressed in the text simply by asserting that its preferred approach would be better policy.") (citation and quotation omitted).

Deference is a powerful thing, and unsurprisingly the executive branch often seeks to create ambiguity where none exists, the better to effectuate its own policies rather than those of the Congress. Left unchecked, this dynamic undermines Congress' legislative function, ceding it instead to the federal executive. That is how the balance of power between the branches of the federal government is distorted. No meaningful system of checks and balances can exist where the executive branch can vest itself with legislative powers. Nor can the system of checks and balances work if the

judicial branch does not stop unwarranted power grabs. And while agencies would prefer to have the leeway to interpret statutes according to their policy preferences, the Constitution does not provide them such authority. This is particularly true when, as here, the plain meaning of Section 103(c) prohibits the Park Service from regulating nonfederal lands in Alaska that are located within conservation system units.

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In sum, *Chevron* honors the bedrock principle that statutes control agency action. In step one, courts examine the words of the statute to determine whether they resolve the dispute. When a particular agency power is absent from the governing statute there is no ambiguity and no need to proceed to *Chevron* step two. The controlling words in this case are clear: Congress did not authorize the Park Service to apply regulations to State of Alaska, Native, and private lands within conservation system units. Accordingly, the Park Service's promulgation and enforcement of 36 C.F.R. § 1.2(a)(3) clearly exceeded its statutory authority.

II. EVEN IF *CHEVRON* STEP TWO GOVERNS, THE PARK SERVICE'S INTERPRETATION IS BASED ON AN IMPERMISSIBLE CONSTRUCTION OF THE STATUTE.

The text of Section 103(c), the overall structure and purpose of ANILCA, and legislative history plainly show that Congress prohibited the Park Service from regulating nonfederal lands within conservation system units as though such lands are part of the National Park System. But even if this

Court finds ambiguity in the statute, the Park Service's expansive interpretation of Section 103(c) should be rejected because it is based on a construction of ANILCA that impairs the State of Alaska's sovereign right to manage state lands and unduly interferes with Native Corporations' statutory right to access and develop Native owned lands.

A. The Park Service's Construction of Section 103(c) Encroaches on Traditional State Power in Violation of Congressional Intent.

Courts must reject an agency's statutory interpretation that "alters the federal-state framework by permitting federal encroachment upon a traditional state power" without a "clear indication that Congress intended that result." *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs* ("*SWANCC*"), 531 U.S. 159, 172-73 (2001). Indeed, it is well established that deference should not be afforded to a federal agency that seeks to strip power properly vested with states. *Id.* at 174 (courts should disregard an agency's interpretation if it "would result in a significant impingement of the States' traditional and primary power over land and water use.").

Here, it cannot be disputed that Alaska's ownership of its submerged lands is an "essential attribute of sovereignty." *Tarrant Reg'l Water Dist. v. Herrmann,* 133 S. Ct. 2120, 2132 (2013) (quotation omitted). Nor can it be disputed that land use regulation is "perhaps the quintessential state activity," *FERC v. Mississippi,* 456 U.S. 742, 768 n.30 (1982), and has been "traditionally performed" by state and local governments. *Hess v.*

Port Auth. Trans-Hudson Corp., 513 U.S. 30, 44 (1994). The right to regulate and manage State lands and resources is, therefore, an essential component of Alaska's sovereignty.

This is especially true given the commitments made by Congress in the Statehood Act, which is not a typical piece of legislation. Instead, it is a Compact between sovereigns and has attributes of a contractual relationship. *See, e.g., Beecher,* 95 U.S. at 523. For this reason, the executive branch does not have the right to unilaterally amend central commitments made by Congress to induce Alaskans to accept statehood, such as the management and control of Alaska's natural resources, which lie at the heart of the State's sovereign interests. *Cf., Hawaii,* 556 U.S. at 176.

But by applying federal regulations designed to control the use of federal lands located in park systems across the United States to lands owned by the State of Alaska, the Park Service is diminishing Alaska's land use decision-making authority. In addition to restricting the use of hovercrafts on state waters, the Park Service is now requiring Alaska to seek federal permission to conduct scientific research on caribou and salmon *on state-owned lands.*[25] Brief Amicus Curiae of Alaska at 17.

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[25] And the Park Service recently published a notice of proposed rulemaking to abrogate an Alaska-specific exemption from certain nationwide oil and gas rules, making the rules enforceable to State lands. *See* General Provisions and Non-Federal Oil and Gas Rights, 80 Fed. Reg. 65,572 (Oct. 26, 2015). The rulemaking explained "that because these regulations are generally applicable to NPS units nationwide and to non-federal interests in those units, they are not (continued...)

The Ninth Circuit has therefore approved a regime in which Alaska may not access its own lands and resources unless it first obtains permission from a federal agency. This grant of plenary power to the Park Service nullifies the strict limitations on federal jurisdiction over nonfederal lands imposed by Congress in ANILCA. It also upsets the compromise achieved in ANILCA, which balanced the federal government's desire to protect public lands with the State of Alaska's need for economic development and meaningful access and control of its resources. *See* 16 U.S.C. §§ 3103, 3111-14, 3117-19; *see also Marsh*, 749 P.2d at 1416-18 & 1418 n.5 (observing that Section 103 "specifically indicat[es] that [State of Alaska and native lands] are not to be restricted by virtue of their location within the boundaries of a conservation system unit"). And it violates the Statehood Act's central commitment to Alaska, which granted the state the right to make land use decisions for the benefit of its people. *Trustees for Alaska*, 736 P.2d at 335. Sovereignty demands no less. *Hawaii*, 556 U.S. at 176.

In short, the Park Service's interpretation of Section 103(c) takes a provision that limits federal authority and transforms it into an unchecked source of power (because of deference) over State of Alaska lands. While ANILCA assigns many duties to various federal agencies, it does not follow that

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(continued)
'applicable solely to public lands within [units established under ANILCA],' and thus are not affected by section 103(c) of ANILCA." *Id.* at 65,573 (quoting *Sturgeon* v. *Masica*, 768 F.3d 1066, 1077-78 (9th Cir. 2014)).

the Park Service can override the specific assignment of powers reserved to Alaska concerning land use decisions on Alaska's lands. Such a drastic change in the amount of control exercised by the federal government over all nonfederal lands within conservation system units in Alaska can only come from Congress. *Cf., Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 266-67 (1979) (requiring clear evidence of congressional intent to change the status quo). After all, a "heavy regulatory burden on the States" simply cannot be attributed to Congress absent solid "textual support" and a "clear statement" from Congress. *PUD No. 1 of Jefferson Cnty. v. Wash. Dept. of Ecology*, 511 U.S. 700, 718 (1994). No such textual support exists in ANILCA. The Park Service therefore cannot rely on Section 103(c), which limits federal power. Nor can it transform a general grant of power to diminish Alaska's sovereignty by circumventing commitments made by Congress to Alaska in the Statehood Act.

B. The Park Service's Construction of Section 103(c) Violates Commitments Made by Congress To Native Corporations.

Enforcing regulations designed for the National Park System on Native Corporations inholdings will disrupt, or even forestall, economic development and daily activities on Native Corporation lands, which were intended to sustain and support Alaska's Native peoples. *See* 43 U.S.C. § 1601 *et seq.; see also City of Saint Paul, Alaska v. Evans*, 344 F.3d 1029, 1031 (9th Cir. 2003).

Yet, because of the Ninth Circuit's holding, which makes a mockery of ANILCA's explicit restrictions on the exercise of federal jurisdiction

over nonfederal lands, federal agencies now have the power to promulgate regulations that require Native Corporations to secure approval from the federal government before landing a plane, building a lodge, going for a hike, picking berries, altering a camping site, or even hunting and fishing *on Native owned lands* located within conservation system units. Brief Amicus Curiae of Arctic Slope Regional Corp. at 14-15. Consequently, the Ninth Circuit's holding is in direct contravention of the unequivocal commitments made to Native Corporations in ANILCA and ANCSA. *See Marsh*, 749 P.2d at 1418 (holding that "Congress intended that the private status of the lands conveyed to [Native Corporations] is to remain unaffected by their inclusion within the exterior boundaries of the conservation system unit").

****

In short, even if *Chevron's* step-2 applies, the Park Service's interpretation of the statute is not "based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843.

CONCLUSION

For the foregoing reasons, and those in Sturgeon's brief and the supporting amici briefs, the Ninth Circuit's decision should be vacated.

Respectfully submitted,

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IN THE

Supreme Court of the United States

JOHN STURGEON,

Petitioner,

v.

SUE MASICA, IN HER OFFICIAL CAPACITY AS ALASKA REGIONAL DIRECTOR OF THE NATIONAL PARK SERVICE *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

AMICI CURIAE BRIEF OF AHTNA, INCORPORATED, ALEUT CORPORATION, BRISTOL BAY NATIVE CORPORATION, CALISTA CORPORATION, DOYON, LIMITED, NANA REGIONAL CORPORATION, GANA-A' YOO, LIMITED, AND TIHTEET' AII, INCORPORATED IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF CITED AUTHORITIES iii

I. Interest of the *Amici Curiae* 1

II. Summary of the Argument 5

III. Argument 7

A. The interpretation of §3103(c) is an important question of federal law that has not been, but should be, settled by this Court 7

B. The Ninth Circuit panel reached its interpretation of §3103(c) in a way that conflicts withrelevant decisions of this Court 10

1. The Ninth Circuit panel interpreted §3103(c) in a way that renders its first and third sentences meaningless 11

2. The Ninth Circuit panel failed to read §3103(c) in light of other relevant provisions of ANILCA 13

3. The Ninth Circuit panel failed to read §3103(c) in light of the key purposes of ANCSA 16

Table of Contents

Page

4. The Ninth Circuit panel interpreted §3103(c) in a way that leads to an absurd result.....18

5. The Ninth Circuit panel offered a selectively edited version of the legislative history of ANILCA to support its interpretation of §3103(c).....19

IV. CONCLUSION 24

EXHIBIT 1 25

TABLE OF CITED AUTHORITIES

Page

Cases

Alaska v.
Native Village of Venetie Tribal Government,
522 U.S. 520 (1998) 3, 8

Amoco Production Co. v.
Village of Gambell, Alaska,
480 U.S. 531 (1987) 7, 13, 18

Chugach Natives, Inc. v. Doyon, Ltd.,
588 F.2d 723 (9th Cir. 1978) 8

City of Angoon v. Marsh,
749 F.2d 1413 (9th Cir. 1984) 8, 17

Dada v. Mukasey,
554 U.S. 1 (2008) 13

Dolan v. U.S. Postal Service,
546 U.S. 481 (2006) 16

Koniag, Inc. v. Koncor Forest Resource,
39 F.3d 991 (9th Cir. 1994) 8

Stratman v. Leisnoi, Inc.,
545 F.3d 1161 (9th Cir. 2008) 14

Tarrant Regional Water Dist. v. Herrmann,
133 S. Ct. 2120 (2013) 18

TABLE OF CITED AUTHORITIES

Page

TRW Inc. v. Andrews,
534 U.S. 19 (2001) 11

U.S. Nat'l Bank of Oregon v. Indep. Ins. Agents of Am., Inc.,
508 U.S. 438 (1993) 13

United States v. Wilson,
503 U.S. 329 (1992) 18

Other Authorities

125 Cong. Rec. 11158 (1979) ..... *passim*

125 Cong. Rec. 9905 (1979) 2, 7, 22

126 Cong. Rec. 21882 (1980) 9

S. Rep. No. 96-413 (1979), reprinted in 1980 U.S.C.C.A.N. 5070 ..... 22, 23

Statutes

16 U.S.C. §3103(c) (ANILCA §103(c)) ..... *passim*

16 U.S.C. §3101(d) (ANILCA §101(d)) 14

16 U.S.C. §3143 4

43 U.S.C. §1601–1629h 1

Cited Authorities

Page

43 U.S.C. §1601(b) 8

43 U.S.C. §1602(e) 18

43 U.S.C. §1603 7

43 U.S.C. §1606(i) 3, 4

43 U.S.C. §1606(j) 4

43 U.S.C. §1609 3

43 U.S.C. §1610 3

43 U.S.C. §1610(a) 18

43 U.S.C. §1611 ..... 3, 18

43 U.S.C. §1613 3

43 U.S.C. §1619 3

43 U.S.C. §1621(g) 4

43 U.S.C. §1621(i) 17

43 U.S.C. §1635(o)(2) (ANILCA §906(o)(2)) 15

43 U.S.C. §1636 16

Cited Authorities

Page

94 Stat. 2394 16

Alaska National Interest Lands Conservation Act (ANILCA) ..... *passim*

Rules

Sup. Ct. R. 10(c) 6

Regulations

61 Fed. Reg. 35134 (1996) 18

I. Interest of the *Amici Curiae*.[1]

The *amici curiae* have an extraordinary interest in this case because they own over 12 million acres of lands that lie within the boundaries of Alaska conservation system units ("CSUs")—an area about 150% larger than Maryland. Under the Ninth Circuit panel's decision, these lands would be subject to highly restrictive CSU regulations, likely making meaningful economic development impossible. Several of the *amici curiae* currently are pursuing resource development projects on these lands, including mining and oil and gas projects on which millions of dollars have already been spent. The Ninth Circuit decision casts significant doubt on these projects and significantly alters and diminishes the Congressional settlement of Native land rights under the Alaska Native Claims Settlement Act ("ANCSA").[2]

Representative John Seiberling sponsored the amendment that became §103(c) of the Alaska National Interest Lands Conservation Act ("ANILCA"), 16 U.S.C. §3103(c). Upon introducing it, and in response to skeptical questioning concerning its effect, Representative Seiberling explained to Congress that the provision

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1. The parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the *amici curiae*'s intention to file this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici curiae*, their shareholders, or their counsel made a monetary contribution to its preparation or submission.

2. 43 U.S.C. §1601–1629h.

would establish "beyond any doubt" that State, Native or private lands that lie within the external boundaries of CSUs in Alaska would not be "subject to *any* of the laws or regulations that pertain to U.S. public lands" or "controlled by *any* of the public land laws of the United States." 125 Cong. Rec. 11158 (1979) (emphasis added). Representative Mo Udall, the House sponsor of ANILCA, assured Congress the inclusion of Native lands within CSU boundaries would not "restrict use of such lands by the owning Corporations." 125 Cong. Rec. 9905 (1979). Now, more than 35 years later, a panel of the Ninth Circuit has ignored these statements, and instead has adopted an interpretation of §3103(c) that directly contradicts them. According to the panel, §3103(c) gives federal conservation agencies, like the National Park Service, virtually unfettered discretion to regulate these State, Native or private lands. The Ninth Circuit's holding contradicts the purposes of ANCSA and would significantly harm the interests of the *amici curiae*.

This brief is submitted on behalf of Alaska Native Regional Corporations Ahtna, Incorporated, The Aleut Corporation, Bristol Bay Native Corporation, Calista Corporation, Doyon, Limited, and NANA Regional Corporation, and Alaska Native Village Corporations Gana-A' Yoo, Limited, and Tihteet' Aii, Incorporated. The *amici curiae* were created pursuant to ANCSA, and represent the interests of more than 60,000 Alaska Native shareholders, many of whom have limited incomes and live in remote locations in rural Alaska.[3]

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3. The *amici* also agree with the *amicus* briefs filed by Arctic Slope Regional Corporation and the State of Alaska.

ANCSA, enacted in 1971, represented a historic new federal policy for Alaska Natives.[4] ANCSA was an alternative to the system of reservations and federal trust supervision that had formed the basis for American Indian policy since the early 1800s. In ANCSA, Congress extinguished the aboriginal land claims of Alaska Natives, and as compensation granted approximately 40 million acres of land to Alaska Native Corporations, including the *amici curiae*.[5] ANCSA granted these lands to them for purposes of economic development and other uses, to allow Alaska Natives to control of their own financial destiny. The Native Corporations selected many of these lands based on their economic development potential.

The Regional Corporations' development of these lands for the benefit of all Alaska Natives is a fundamental part of the financial settlement Congress created in ANCSA. Under ANCSA Section 7(i), 43 U.S.C. §1606(i), each Regional Corporation is required to share seventy

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4. This Court addressed ANCSA's purposes in *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520, 523-24 (1998).

5. The land provisions of ANCSA are complex, but can be summarized as follows: ANCSA granted up to 22 million acres of surface estate to Village Corporations. ANCSA also granted to Regional Corporations the subsurface (mineral) estate beneath those Village surface lands, and approximately 18 million acres of additional surface and subsurface estate. *See* 43 U.S.C. §§1610, 1611, and 1613. In addition, ANCSA granted about 4 million acres of surface and subsurface estate to Village Corporations on revoked Indian reservations that opted not to accept any further benefits of ANCSA. 43 U.S.C. §1619. As further compensation, ANCSA also provided for the grant of $962.5 million to Native Corporations in payments terminating in 1981. 43 U.S.C. §1609.

percent (70%) of the revenues from resource extraction with the other land-owning Regional Corporations. Under Section 7(j), 43 U.S.C. §1606(j), one-half of the revenues that are received by a Regional Corporation under Section 7(i) is distributed to the Village Corporations located within its regional boundaries, and to its "at large" shareholders (those not enrolled to a Village Corporation). Thus, resource revenues from ANCSA lands flow directly or indirectly to all Natives.

The ability to develop these ANCSA lands and to share the revenues with all Natives under 43 U.S.C. §1606(i) and (j) is integral to the success of ANCSA. Well over $1 billion derived from resource development of ANCSA lands has been distributed under 43 U.S.C. §1606(i) and (j) since 1971.

In 1980, nine years after the enactment of ANCSA, Congress enacted ANILCA,[6] which placed about 105 million acres of federal lands in new or expanded CSUs. Congress sought to include entire ecosystems in CSUs. Thus many of the CSUs completely surrounded ANCSA lands. The amount of ANCSA lands that fell within these CSUs is staggering: the *amici curiae* alone own about 12 million acres within ANILCA CSUs,[7] comprising about 30% of all ANCSA lands; all ANCSA Corporations

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6. Pub. L. 96-487, 94 Stat. 2371 (1980).

7. Some of the *amici curiae*'s land holdings in CSUs are surface estate only, some are subsurface only, and some are both surface and subsurface. The ANCSA lands within CSUs represent from about 20% to 100% of the total ANCSA entitlements of the individual *amici*. The small portion of CSU lands within pre-ANCSA Wildlife Refuges is also subject to federal regulation pursuant to 43 U.S.C. §1621(g), and 16 U.S.C. §3143.

together own approximately 18 million acres within ANILCA CSUs, or about 40% of all ANCSA lands—an area larger than 10 of the states.[8]

Placing these CSUs over existing ANCSA lands would directly threaten the success of the ANCSA land settlement. Thus, the ANCSA Corporations sought inclusion of a provision in ANILCA to protect their lands from being affected by the CSUs. The result was §3103(c), in which Congress excluded ANCSA and State lands from the CSUs surrounding them and exempted them from the regulations written to govern the CSUs.[9] By reaching this solution, Congress recognized and accommodated its purposes in enacting both ANCSA and ANILCA, and granted a priority to the uses of ANCSA lands where ANCSA and ANILCA lands coincide.

However, without even *mentioning* ANCSA, the Ninth Circuit panel reached an interpretation of §3103(c) that would subject up to 40% of all ANCSA lands to restrictive CSU regulations. That holding breaks the promise made in ANCSA to Alaska Natives. It directly conflicts with the important Congressional purposes underlying ANCSA, and with the language, structure, and policy of §3103(c).

II. Summary of the Argument

A writ of certiorari is appropriate because the interpretation of §3103(c) is "an important question of federal law that has not been, but should be, settled by this

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8. *See* map, Exhibit 1.

9. Although this case arises in relation to the State's ownership of the bed and banks of a navigable river, §3103(c) also applies to Native owned uplands.

Court." Sup. Ct. R. 10(c). Section 3103(c) resolves conflicts in land ownership and land use arising under ANCSA and ANILCA, two statutes of national significance. ANILCA was a direct outgrowth of ANCSA. ANCSA extinguished the aboriginal land claims of Alaska Natives. In exchange, Congress conveyed approximately 40 million acres of land and $962.5 million to Alaska Native Corporations to assist Alaska Natives in achieving financial independence and self-sufficiency. The interpretation of §3103(c) could significantly impair the accomplishment of this critical federal purpose. Therefore, this Court should decide the question.

This Court should also grant certiorari because the Ninth Circuit panel reached its interpretation of §3103(c) in a way that conflicts with relevant decisions of this Court regarding the interpretation of statutes. *See* Sup. Ct. R. 10(c). Specifically, the panel (1) read §3103(c) in a way that would render the first and third sentences meaningless, (2) failed to read §3103(c) in light of ANILCA as a whole, (3) failed to consider ANCSA, the historic settlement that laid the groundwork for the passage of ANILCA, and (4) read §3103(c) in a way that leads to an absurd result. In addition, the panel selectively quoted and inaccurately characterized several key pieces of legislative history in a way to suggest they support its interpretation of the statute. In reality, the legislative history of ANILCA uniformly contradicts the panel's decision.

III. Argument

A. The interpretation of §3103(c) is an important question of federal law that has not been, but should be, settled by this Court

Section 3103(c) establishes a statutory priority to resolve conflicts in land ownership and land use arising under ANCSA and ANILCA, two enactments of national significance. The interpretation of §3103(c) is a question that should be settled by this Court because of the substantial impact that it could have on the nationally important Native settlement embodied in ANCSA. Under the Ninth Circuit panel's interpretation, up to 18 million acres of lands conveyed to Alaska Natives pursuant to ANCSA could become undevelopable, thus defeating the Congressional purpose of ANCSA and breaking the promise of ANCSA to Natives. If this is the proper interpretation of §3103(c), then this Court should be the judicial body that says so.

ANILCA was a "direct outgrowth" of ANCSA. 125 Cong. Rec. 9905 (1979) (comment by Representative Mo Udall, the primary sponsor of ANILCA in the House); *see also Amoco Production Co. v. Village of Gambell, Alaska*, 480 U.S. 531, 549 (1987) ("ANILCA's primary purpose was to complete the allocation of federal lands in the State of Alaska, a process begun with the Statehood Act in 1958 and continued in 1971 in ANCSA."). In ANCSA, Congress extinguished the aboriginal land claims of Alaska Natives. *See* 43 U.S.C. §1603. To compensate Alaska Natives for the loss of these claims, Congress authorized the conveyance of approximately 40 million acres of land and payment of $962.5 million to newly-

formed Alaska Native Corporations. *City of Angoon v. Marsh*, 749 F.2d 1413, 1414 (9th Cir. 1984). Congress knew that the overwhelming majority of this land would "be selected for its economic potential." *Koniag, Inc. v. Koncor Forest Resource*, 39 F.3d 991, 996 (9th Cir. 1994) (quoting H.R. Rep. 92-523 at 5, 1971 U.S.C.C.A.N. at 2195). Most importantly for purposes of this case, Congress intended "that those Native corporations that did select land for its economic potential would be able to develop that land and to realize that potential." *Id.* at 997. An integral part of the settlement was the requirement to share 70% of the proceeds of subsurface and timber resource development with other land-owning Regional Corporations, and in turn with all Village Corporations, under 43 U.S.C. §1606(i) and (j). These revenue sharing requirements "achieve a rough equality of assets among all the Natives." *Chugach Natives, Inc. v. Doyon, Ltd.*, 588 F.2d 723, 732 (9th Cir. 1978) (citations and quotations omitted).

This approach constituted a significant departure from lower forty-eight Indian policy. In §2 of ANCSA, Congress explained that its intent was to resolve aboriginal land claims "in conformity with the real economic and social needs of Natives,...with maximum participation by Natives in decisions affecting their rights and property,... without creating a reservation system or lengthy wardship or trusteeship." 43 U.S.C. §1601(b). As this Court has recognized, ANCSA was an effort by Congress to "end the sort of federal supervision over Indian affairs that had previously marked federal Indian policy." *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520, 523-24 (1998). Instead, ANCSA tasked Alaska Natives themselves "to develop that land and to realize that [economic] potential." *Koniag*, 39 F.3d at 997. Accordingly,

the ability of Alaska Native Corporations to develop the lands conveyed to them was absolutely essential to the promise of ANCSA.

With this promise in place, Alaska Native Corporations were greatly concerned when it became apparent nine years later that much of their ANCSA land would fall within the boundaries of the CSUs that were to be created or expanded by ANILCA. They fought vigorously for the inclusion in ANILCA of provisions that would preserve the economic potential of these lands. *See, e.g.*, 126 Cong. Rec. 21882 (1980) (referencing concerns of Doyon, Limited president Tim Wallis). These efforts, and those of the State of Alaska, were the genesis of §3103(c). *See, e.g.*, 125 Cong. Rec. 11158 (1979) (Representative John Seiberling, the sponsor of the amendment that became §3103(c), explaining that he offered the provision to make clear that non-public lands within the external boundaries of new or expanded CSUs would not be "subject to any of the laws or regulations that pertain to U.S. public lands.").

The Ninth Circuit panel's decision that millions of acres of ANCSA lands—40% of all ANCSA lands—are subject to highly-restrictive conservation regulations would decimate the economic value of those lands. Such a result would fundamentally alter the tradeoff at the heart of ANCSA: the grant of approximately 40 million acres of land to Alaska Natives as compensation for the total extinguishment of their aboriginal land claims. This historic compromise served two critical national purposes, one of which—extinguishment of Alaska Native aboriginal title—has already been accomplished. The accomplishment of the second purpose—securing the economic futures of Alaska Natives—is an ongoing concern that, as the Ninth Circuit panel's decision demonstrates, will be significantly

impacted by the interpretation of §3103(c). As such, this case presents an important question of federal law that should be decided by this Court.

B. The Ninth Circuit panel reached its interpretation of §3103(c) in a way that conflicts with relevant decisions of this Court

A grant of certiorari is also appropriate because the Ninth Circuit panel interpreted §3103(c) in a way that conflicts with relevant decisions of this Court regarding the construction of statutes. Focusing entirely on nine words in the second sentence—"regulations applicable solely to public lands within such units"—the panel concluded that §3103(c) exempts non-public lands (including ANCSA lands) from Alaska-specific CSU regulations but leaves them subject to nationwide CSU regulations. In reaching this strained and artificial interpretation, the panel ignored four basic principles of statutory construction established by this Court.

First, the panel failed to read §3103(c) in a way that gives effect to every word in the statute. Under its interpretation, the first and third sentences of §3103(c) would be rendered meaningless.

Second, the panel failed to interpret §3103(c) in light of ANILCA as a whole. Other provisions of ANILCA demonstrate that Congress exempted non-public lands (including ANCSA lands) from *all* CSU regulations, not just Alaska-specific regulations.

Third, the panel failed to consider an important precedent that would have greatly informed its analysis.

In reaching a conclusion that would significantly impact the land rights of Alaska Natives, the panel made no mention whatsoever of ANCSA, the historic legislation that granted those rights.

Fourth, the panel interpreted §3103(c) in a way that would lead to an absurd result. Specifically, its holding would leave non-public Alaska lands subject to nationwide CSU regulations while exempting them from Alaska-specific CSU regulations, which are generally more permissive than nationwide regulations.

Fifth, compounding these errors, the panel suggested that its strained reading of the statute is supported by the legislative history of ANILCA. This is absolutely, unequivocally incorrect. Every single piece of legislative history cited by the panel actually demonstrates that Congress intended to exempt non-public lands from all CSU regulations. There is no legislative history supporting the panel's holding. Only through selective editing was the panel able to reach a different conclusion.

1. The Ninth Circuit panel interpreted §3103(c) in a way that renders its first and third sentences meaningless

"It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (citations and quotations omitted). The Ninth Circuit panel violated this "cardinal principle" by fixing its attention entirely on the second sentence of §3103(c), rendering the first and

third sentences meaningless. Congress wrote the three sentences of §3103(c) to work together as a comprehensive whole.

The first sentence states: "Only those lands within the boundaries of any conservation system unit which are public lands (as such term is defined in this Act) shall be deemed to be included as a portion of such unit." This sentence establishes that non-public lands (including ANCSA lands) lying within the external boundaries of a CSU are not part of the CSU merely by virtue of that geographic fact.

The second sentence states: "No lands which, before, on, or after December 2, 1980, are conveyed to the State, to any Native Corporation, or to any private party shall be subject to the regulations applicable solely to public lands within such units." This sentence is a direct complement to the first and means that ANCSA land that is not part of a CSU will not be regulated as such simply because it lies within the external boundaries of the CSU.

The third sentence states: "If the State, a Native Corporation, or other owner desires to convey any such lands, the Secretary may acquire such lands in accordance with applicable law (including this Act), and any such lands shall become part of the unit, and be administered accordingly." This sentence explains how the acquisition of land by the relevant Secretary alters the state of affairs established by the first two sentences: the lands "become part of the unit" and are "administered accordingly." Logically, until such lands are acquired, they are not administered as "part of the unit."

Giving effect to all three sentences, as this Court's precedents require, the meaning of §3103(c) becomes clear: non-public lands within the boundaries of a CSU are not part of the CSU and will not be regulated as though they are, unless they are acquired by the federal government. However, the Ninth Circuit panel gave undue attention to the second sentence, not only distorting its meaning but also rendering the first and third sentences meaningless. That is, if the second sentence subjects non-public land to regulations governing a CSU, then the land is, for practical purposes, "a portion of" the CSU (contrary to the first sentence), and it can be "administered accordingly" even if it is never acquired by the Federal Government (contrary to the third sentence). The panel's interpretation thus renders first and third sentences of §3103(c) superfluous or void.

2. The Ninth Circuit panel failed to read §3103(c) in light of other relevant provisions of ANILCA

The Ninth Circuit panel failed to comply with this Court's admonition that provisions of ANILCA "must be viewed in the context of the Act as a whole." *Amoco*, 480 U.S. at 549; *see also U.S. Nat'l Bank of Oregon v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 438, 455 (1993) ("In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy."); *Dada v. Mukasey*, 554 U.S. 1, 16 (2008) ("In reading a statute we must not look merely to a particular clause, but consider in connection with it the whole statute."). When viewed in the context of ANILCA as a whole, §3103(c) exempts ANCSA lands from all CSU regulations.

The Ninth Circuit panel began its analysis of §3103(c) by citing the first section of ANILCA, which explains that the Act serves both environmental *and* economic purposes, in that it "provides sufficient protection for the national interest in the scenic, natural, cultural and environmental values on the public lands in Alaska, *and at the same time provides adequate opportunity for satisfaction of the economic and social needs of the State of Alaska and its people*[.]" 16 U.S.C. §3101(d) (ANILCA §101(d)) (emphasis added). However, the panel then immediately mischaracterized a passage from an earlier Ninth Circuit decision to suggest that ANILCA is a predominantly conservational measure: "Summarized succinctly, 'ANILCA is generally concerned with the designation, disposition, and management of land for environmental preservation purposes.' *Stratman v. Leisnoi, Inc.*, 545 F.3d 1161, 1165 (9th Cir. 2008)." Op. 19.

What the Ninth Circuit actually said in *Stratman* was this: "*Although* ANILCA is generally concerned with the designation, disposition, and management of land for environmental preservation purposes, *part of ANILCA is devoted to the implementation and cleanup of ANCSA*." 545 F.3d at 1165 (emphasis added; citation omitted). The panel's careful avoidance of the ANCSA reference is telling. Of ANILCA's 180 pages, only about 45 related to the creation or expansion of CSUs (*see* Titles II-VII), while most of the remaining 135 were made up of compromise provisions addressing various ANCSA and State concerns (*see, e.g.*, Titles VIII-XIV and parts of Title I). Contrary to the panel's suggestion, ANILCA was not only directed at environmental protection—it was also directed at implementing ANCSA.

Several provisions of ANILCA demonstrate that non-public lands within the external boundaries of Alaska CSUs are generally exempt from CSU regulations. Most notably, 43 U.S.C. §1635(o)(2) (ANILCA §906(o)(2)) provides, "*Until conveyed* [to a Native Corporation or the State], all Federal lands within the boundaries of a conservation system unit...shall be administered in accordance with the laws applicable to such unit." (Emphasis added.) The obvious corollary to this requirement is that once lands within the boundaries of a CSU are conveyed to a Native Corporation or the State, they shall *not* "be administered in accordance with the laws applicable to such unit." If this were not the case, 43 U.S.C. §1635(o)(2) would be entirely superfluous.

Congress included §3103(c) in addition to §1635(o)(2) because all CSUs were described in ANILCA by reference to maps, and not legal descriptions. Section 3103 is titled "Maps," and subsection (c) was added to clarify that non-public lands that lie within the boundaries of a CSU as depicted on an ANILCA map are not part of the CSU, or subject to the regulations governing the CSU. The Congressman who introduced the language that became §3103(c), John Seiberling, explained on the House floor that this was the precise purpose of the provision:

> Mr. Chairman, what [§3103(c)] does is say that the fact that [State, native, or private land] is within the boundaries drawn on the map for that conservation unit does not in any way change the status of that State, native, or private land or make it subject to *any* of the laws or regulations that pertain to U.S. public lands, so that those inholdings are clearly not

> controlled by *any* of the public land laws of the United States.

125 Cong. Rec. 11158 (1979) (emphasis added). Far from creating a distinction between Alaska-specific and nationwide regulations, §3103(c) clarified that non-public lands would not be subject to *any* CSU regulations, notwithstanding their location on an ANILCA map. Only by reading the second sentence of §3103(c) in isolation was the Ninth Circuit panel able to reach a different conclusion.

Two other provisions of ANILCA that make clear that non-public lands within the boundaries of CSUs are generally exempt from CSU regulations are §304(f) (94 Stat. 2394) and §907(a) (43 U.S.C. §1636(a)). Those sections provide that non-public land becomes subject to federal management if the owner agrees in writing to such management. If this land were already subject to federal management, as the Ninth Circuit panel held, these provisions would be unnecessary.

3. The Ninth Circuit panel failed to read §3103(c) in light of the key purposes of ANCSA

Despite the fact that §3103(c) expressly applies to lands owned by Alaska Native Corporations, and despite its decision's dramatic effect on ANCSA lands and Alaska Natives, the Ninth Circuit panel did not even *mention* ANCSA in its opinion. This Court has held that a statute should be interpreted in light of "any precedents or authorities that inform the analysis." *Dolan v. U.S. Postal Service*, 546 U.S. 481, 486 (2006). If ANCSA, the historic

precursor to ANILCA, does not "inform the analysis" of §3103(c), then ANILCA took back what ANCSA promised to Alaska Natives in return for giving up their aboriginal rights.

No provision of ANILCA that addresses the rights and interests of Alaska Natives, particularly §3103(c), can be fully understood without also understanding the purposes of ANCSA. As discussed in detail in section III.A, above, Congress, in ANCSA, granted approximately "40 million acres of land to Alaska Natives as compensation for extinguishment of their claims *and to assist them in achieving financial independence and self-sufficiency.*" *City of Angoon*, 749 F.2d at 1414 (emphasis added). The Ninth Circuit panel's interpretation of §3103(c) rendered millions of those acres essentially valueless without so much as noting this vital purpose.[10] When read against the backdrop of ANCSA, one critical intention of §3103(c) becomes abundantly clear: to preserve the economic value of lands conveyed to Native Corporations by exempting them from regulations written to govern CSUs.

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10. Notably, the Ninth Circuit panel that decided *City of Angoon v. Marsh* relied heavily on ANCSA in concluding that Native Corporation lands within the external boundaries of the Admiralty Island National Monument are not "within" the Monument and therefore are not subject to a timber harvesting ban applicable to the Monument. *See, e.g.*, 749 F.2d at 1416 (citing ANCSA §22(i) (43 U.S.C. §1621(i)) in support of its conclusion that "Congress has made it clear that the Secretary cannot manage private lands which have been conveyed to a Native Corporation"). That panel also cited ANILCA §103(c) as support for its conclusion that "the drafters of ANILCA never intended the mere location of boundary lines on maps delineating the overall conservation system to indicate that private lands conveyed to Native Corporations were to be treated as public lands." *Id.* at 1417-18.

This Court has only interpreted one section of ANILCA, and when it did, it relied in part on related sections of ANCSA. In *Amoco*, this Court addressed whether ANILCA §810, a subsistence rights provision, applies to the outer continental shelf. In deciding that it does not, this Court cited three pertinent sections of ANCSA. *See* 480 U.S. at 552 (citing 43 U.S.C. §§1602(e), 1610(a), and 1611). *Amoco* demonstrates that considering the history and purposes of ANCSA is absolutely critical to a full understanding of any provision of ANILCA that concerns Alaska Native rights. In this case, the Ninth Circuit panel did not say a word about ANCSA.

4. The Ninth Circuit panel interpreted §3103(c) in a way that leads to an absurd result

This Court has instructed that an interpretation of a statute that leads to an absurd result should be avoided if there is a reasonable alternative interpretation. *See, e.g.*, *Tarrant Regional Water Dist. v. Herrmann*, 133 S. Ct. 2120, 2131 (2013); *United States v. Wilson*, 503 U.S. 329, 334 (1992). The panel's strained interpretation leads to an absurd result that was readily avoidable.

Under the panel's interpretation of §3103(c), non-public lands (including ANCSA lands) that are situated within the external boundaries of Alaska CSUs would be subject to nationwide CSU regulations but would be exempt from Alaska-specific CSU regulations. However, the National Park Service has itself recognized that Alaska-specific regulations "generally are relaxations of prohibitions contained in the general regulations." *See* 61 Fed. Reg. 35134 (1996). It is an absurd result for non-public lands to

be subject to greater use restrictions than the surrounding CSUs.

5. The Ninth Circuit panel offered a selectively edited version of the legislative history of ANILCA to support its interpretation of §3103(c)

Compounding the serious interpretive errors discussed above, the Ninth Circuit panel suggested that the legislative history of ANILCA confirms its reading of §3103(c). Nothing could be further from the truth. None of the materials cited by the panel indicate that Congress ever contemplated a distinction between Alaska-specific regulations and nationwide regulations. Rather, they uniformly support the conclusion that §3103(c) exempts non-public lands within the boundaries of CSUs from *all* CSU regulations. The panel was able to reach a different result only by selective quotation to omit the language that directly contradicts its holding.

The panel began by quoting part of a statement made by Representative Seiberling in support of his proposed addition of §3103(c). Specifically, the panel observed that "[t]he first sentence of §3103(c) makes clear that the boundaries of CSUs 'do[...] not in any way change the status of that State, native, or private land' lying within those boundaries." Op. 21 (quoting 125 Cong. Rec. 11158 (1979)). The panel's reliance on this passage is puzzling. Before ANILCA, the "status" of these lands was that they did not lie within CSUs and therefore were not subject to regulations governing CSUs. Representative Seiberling's explanation—that he offered §3103(c) to ensure that this status would not change—conflicts starkly with the panel's interpretation of the provision.

The Ninth Circuit panel chose to omit the remainder of the sentence in which the above-quoted passage appeared. The omitted portion directly contradicts the Ninth Circuit's holding. Representative Seiberling stated, in full:

> Mr. Chairman, what [§3103(c)] does is say that the fact that [State, native, or private land] is within the boundaries drawn on the map for that conservation unit does not in any way change the status of that State, native, or private land *or make it subject to any of the laws or regulations that pertain to U.S. public lands, so that those inholdings are clearly not controlled by any of the public land laws of the United States.*

125 Cong. Rec. 11158 (emphasis added). Representative Seiberling's actual words establish that under §3103(c) non-public lands that fall within the external boundaries of CSUs as a result of ANILCA would not be subject to "*any* of the laws or regulations that pertain to" the CSUs, regardless of whether the regulations are applicable nationwide or only in Alaska. *See also id.* at 11156 (Representative Seiberling explaining that his amendment "makes it clear that any lands, State, native or private lands, which lie within the outer boundaries of the conservation unit in the Udall bill *are not subjected to regulations which are applied to public lands.*") (emphasis added). By citing only part of this passage, the Ninth Circuit altered its meaning to be the opposite of what Representative Seiberling actually said.

The panel also noted that Representative Seiberling "offered the view that his amendment 'restate[d] and

ma[de] clear' that nonfederal lands within CSUs would not be 'subject to regulations which are applied to public lands which, in fact, are part of the unit.'" Op. 24 (citing 125 Cong. Rec. 11158). This statement does not support the panel's reading of §3103(c). Representative Seiberling was emphasizing, again, that non-public lands would not be subject to *any* regulations written to govern the CSUs, whether Alaska-specific or nationwide. The Ninth Circuit panel did not mention Representative Seiberling's explanation on the same page of the Congressional Record that he offered his amendment to reinforce the existing text of the bill, which, he believed, "does not alter in any way the ability of the State or Natives *to do what it will* with those lands." 125 Cong. Rec. 11158 (emphasis added). This also plainly contradicts the panel's holding.

Next, the panel observed that Representative Mo Udall, the primary sponsor of ANILCA in the House, "declared that nonfederal land would not be constrained by 'regulations applicable to the public lands within the specific conservation system unit.'" Op. 24 (citing 125 Cong. Rec. 9905 (1979)). The panel did not explain how this statement supports its interpretation of §3103(c). Presumably, the panel would say that Representative Udall used the phrase "the specific conservation system unit" in order to create a distinction between regulations applicable nationwide and regulations applicable only in Alaska CSUs. This is incorrect. Representative Udall's full statement, which the Ninth Circuit panel omitted from its opinion, demonstrates an intent identical to Representative Seiberling's. He said:

> I want to make clear that inclusion of these Native lands within the boundaries of

> conservation system units *is not intended to affect any rights which the corporations may have under this act, the Alaska Native Claims Settlement Act, or any other law, or to restrict use of such lands by the owning corporations* nor to subject the Native lands to regulations applicable to the public lands within the specific conservation system unit.

125 Cong. Rec. 9905 (emphasis added). Apparently, the panel chose to exclude the full text because Representative Udall's language directly contradicts its reading of §3103(c). By quoting only a few words from this sentence, the panel altered its meaning to be the opposite of what Congressman Udall actually said.

The panel also stated that a 1979 report by the Senate Committee on Energy and Natural Resources "notes that §103(c) would exempt non-Federal land from 'regulations which may be adopted to manage and administer any [CSU] which is adjacent to, or surrounds, the private or non-Federal public lands.'" Op. 24-25 (citing S. Rep. No. 96-413, at 303 (1979), *reprinted in* 1980 U.S.C.C.A.N. 5070, 5247). However, the panel extracted this language from a longer passage, the full text of which demonstrates that the Committee did not draw a distinction between nationwide and Alaska-specific CSU regulations:

> Those private lands, and those public lands owned by the State of Alaska or a subordinate political entity, are not to be construed as subject to the management regulations which may be adopted to manage and administer any national conservation system unit which is adjacent

> to, or surrounds, the private or non-Federal public lands. *Federal laws and regulations of general applicability to both private and public lands, such as the Clean Air Act, the Water Pollution Control Act, U.S. Army Corps of Engineers wetlands regulations, and other Federal statutes and regulations of general applicability would be applicable to private or non-Federal public land inholdings within conservations [sic] system units, and to such lands adjacent to conservation system units, and are thus unaffected by the passage of this bill.*

S. Rep. No. 96-413, at 303 (1979), *reprinted in* 1980 U.S.C.C.A.N. 5070, 5247 (emphasis added). The second sentence of this paragraph shows that the Committee's purpose was to establish that "private or non-Federal public lands" (including ANCSA and State lands) within CSUs, while not subject to regulations written specifically to govern CSUs, would still be subject to federal statutes and regulations that apply to *all* land in the United States, whether public or private.

The Committee's report also reveals why the word "solely" was included in the second sentence of §3103(c)—a reason quite different than the panel asserts. Without that word, the second sentence would exempt non-public lands within the external boundaries of CSUs from all "regulations applicable [...] to public lands within [CSUs]." *See* 16 U.S.C. §3103(c). Such language could be read to exempt these non-federal lands from "Federal laws and regulations of general applicability"—laws that apply to all lands in the United States—like those environmental

statutes the Committee used as examples: the Clean Air Act and the Water Pollution Control Act (the Clean Water Act). Tellingly, the Ninth Circuit panel omitted the Committee's second sentence in its opinion.

IV. Conclusion

For the foregoing reasons, this Court should grant certiorari.

Respectfully submitted,

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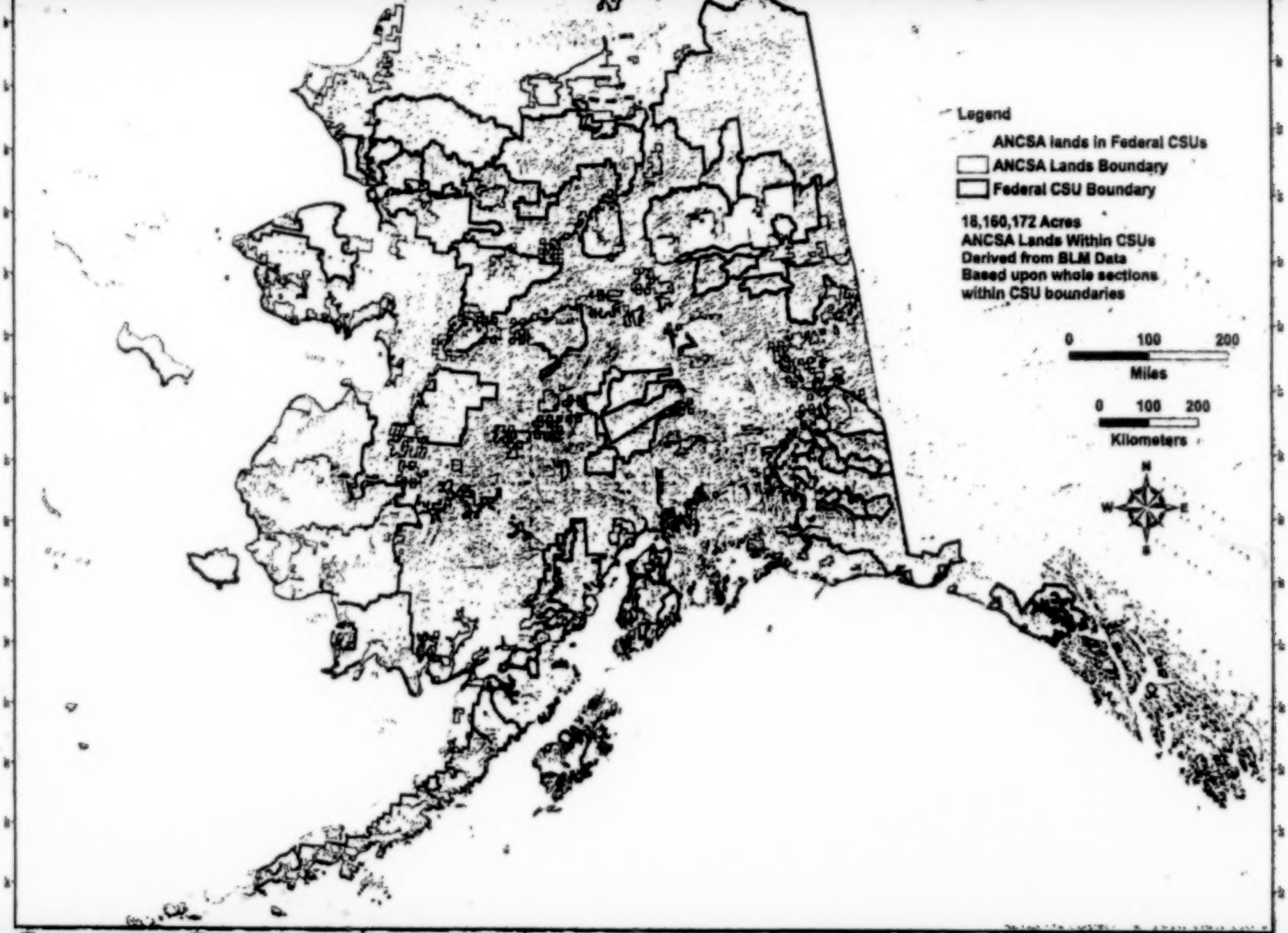
EXHIBIT 1

MAP OF ANCSA LANDS WITHIN ALASKA FEDERAL CONSERVATION SYSTEM UNITS


Legend
ANCSA lands in Federal CSUs
ANCSA Lands Boundary
Federal CSU Boundary
18,160,172 Acres
ANCSA Lands Within CSUs
Derived from BLM Data
Based upon whole sections
within CSU boundaries
0 100 200
Miles
0 100 200
Kilometers
N
W
E
S

No. 14-1209

In The
Supreme Court of the United States

JOHN STURGEON,

Petitioner,

v.

BERT FROST, in his Official Capacity as Alaska Regional Director of the National Park Service,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICUS CURIAE* STATE OF ALASKA IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether Section 103(c) of the Alaska National Interests Lands Conservation Act of 1980 prohibits the National Park Service from exercising regulatory control over State, Native Corporation, and private Alaska land physically located within the boundaries of the National Park System.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iv
INTEREST OF *AMICUS CURIAE*	1
INTRODUCTION	2
SUMMARY OF ARGUMENT	5
ARGUMENT	8
I. The Ninth Circuit's Decision Deprives Alaska of Its Sovereign Prerogative to Manage Its Lands and Waters Consistent With the Needs of Its People	8
A. Alaska's ownership of its lands and waters is an essential aspect of its state sovereignty	9
B. Loss of Alaska's sovereign power to regulate its own lands and waters will inflict serious harms on ordinary Alaskans	14
II. ANILCA §103 Exempts Nonfederal Lands from Federal Park Management Regulation	23
A. The plain language of §103(c) exempts State, Native Corporation, and privately owned land within CSUs from being regulated as though they were federal lands	24

TABLE OF CONTENTS – Continued

Page

B. ANILCA's context and structure confirm that the Park Service cannot regulate nonfederal lands within Alaska CSUs 28

C. ANILCA's legislative history confirms Mr. Sturgeon's reading of §103(c) 32

D. The Park Service's interpretation of §103(c) impinges on Alaska's right to regulate its lands absent clear congressional intent, and therefore conflicts with the clear statement doctrine and is not entitled to *Chevron* deference 35

CONCLUSION 39

APPENDIX

Appendix A: Alaska Department of Natural Resources Map of Alaska Conservation Systems Units ..... App. 1

TABLE OF AUTHORITIES

Page

CASES

Alaska v. Babbitt, 72 F.3d 698 (9th Cir. 1995).....13, 14

Alaska v. United States, 201 F.3d 1154 (9th Cir. 2000).....11

Alaska v. United States, 545 U.S. 75 (2005).....12

Amoco Prod. Co. v. Vill. of Gambell, Alaska, 480 U.S. 531 (1987).....29

Bilski v. Kappos, 561 U.S. 593 (2010).....28

BP America Prod. Co. v. Burton, 549 U.S. 84 (2006).....24

Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).....35, 36, 38

City of Angoon v. Marsh, 749 F.2d 1413 (9th Cir. 1984).....30

City of Saint Paul, Alaska v. Evans, 344 F.3d 1029 (9th Cir. 2003).....10

Coyle v. Smith, 221 U.S. 559 (1911).....1, 12

General Dynamics Land Sys., Inc. v. Cline, 540 U.S. 581 (2004).....36

Gregory v. Ashcroft, 501 U.S. 452 (1991).....37

Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261 (1997).....13

Illinois Central R.R. Co. v. Illinois, 146 U.S. 387 (1892).....12, 13

Mansell v. Mansell, 490 U.S. 581 (1989).....25

TABLE OF AUTHORITIES – Continued

Page

Metlakatla Indian Community v. Egan, 369 U.S. 45 (1962) 9

Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel, 429 U.S. 363 (1977) 12

Rapanos v. United States, 547 U.S. 715 (2006) 21, 22

Robinson v. Shell Oil Co., 519 U.S. 337 (1997) 29

Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, 531 U.S. 159 (2001) 37, 38

Tarrant Reg'l Water Dist. v. Herrmann, 133 S. Ct. 2120 (2013) 1, 18

Trustees for Alaska v. State of Alaska, 736 P.2d 324 (Alaska 1987) 9

U.S. Nat'l Bank of Oregon v. Indep. Ins. Agents of Am., Inc., 508 U.S. 439 (1993) 28

United States v. Alaska, 521 U.S. 1 (1997) 13

United States v. Gonzales, 520 U.S. 1 (1997) 32

United States v. Lindsey, 595 F.2d 5 (9th Cir. 1979) 17

Utility Air Regulatory Grp. v. EPA, 134 S. Ct. 2427 (2014) 29, 36

Will v. Michigan Dep't of State Police, 491 U.S. 58 (1989) 37

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISION

Alaska Constitution – Article VIII 10, 13

STATUTES, RULES AND REGULATIONS

16 U.S.C. §3101 *et seq.* 2

16 U.S.C. §3101(d) 2, 16, 30, 32

16 U.S.C. §3102(1) 4

16 U.S.C. §3102(4) 2

16 U.S.C. §3103 3

16 U.S.C. §3103(c) ..... *passim*

16 U.S.C. §3111-14 3

16 U.S.C. §3111-26 30

16 U.S.C. §3170 30

16 U.S.C. §3170(a) 31

16 U.S.C. §3202 3

16 U.S.C. §3202(a) 16

16 U.S.C. §3207 ..... 3, 16

43 U.S.C. §§1301 *et seq.* 12

43 U.S.C. §1311(a) 12

43 U.S.C. §§1601 *et seq.* 10

Alaska Stat. §§38.05.127-.128 13

Alaska Stat. §38.05.126(b) 13

TABLE OF AUTHORITIES – Continued

Page

Alaska Statehood Act, Pub. Law No. 85-508, 72 Stat. 339 §6(m) (1958) 12

ANILCA §1102(4)(B)(vi) 18

ANILCA §1110(b) 20

ANILCA §3102(2)-(3) 13, 24

36 C.F.R. §1.2 31

36 C.F.R. §1.2(a)(1) 5

36 C.F.R. §1.2(a)(3) 5, 23

36 C.F.R. §1.4(a) 17

36 C.F.R. §4.10 17

36 C.F.R. §5.3 17

36 C.F.R. §9(b) 20

36 C.F.R. §13.25 32

36 C.F.R. §13.30 32

36 C.F.R. §13.45 32

36 C.F.R. §13.182 32

OTHER AUTHORITIES

80 Fed. Reg. 65571 (proposed Oct. 26, 2015) 21

125 Cong. Rec. 11158 (1979) 7, 26, 33, 35

Alaska Department of Revenue, Revenue Sources Book (2015 Spring) 11

S. Rep. 96-413 *reprinted in* 1980 U.S.C.C.A.N. 5070 ..... 16, 34

INTEREST OF *AMICUS CURIAE*

This case is about who has regulatory authority over millions of acres of nonfederal lands and waters within Alaska – the State of Alaska or a federal land management agency. The Ninth Circuit's decision below interprets §103(c) of the Alaska National Interest Lands Conservation Act ("ANILCA") to give that authority to the National Park Service. After Native Corporations, the State owns the second largest area of nonfederal lands in Alaska's National Park System units. It has a uniquely compelling interest in managing those lands, as well as its waters, which are deeply tied to its sovereignty. Alaska's "ownership of [its] submerged lands, and the accompanying power to control navigation, fishing, and other public uses of water" – like its right to regulate its navigable waters – is "an essential attribute of sovereignty." *Tarrant Reg'l Water Dist. v. Herrmann*, 133 S. Ct. 2120, 2132 (2013) (internal quotation marks omitted); *Coyle v. Smith*, 221 U.S. 559, 573 (1911).

The Ninth Circuit's interpretation of §103(c) to eliminate local control of nonfederal lands in favor of nationalized land management has broad ramifications that will adversely impact Alaska and its people. The ruling ignores the reality of life throughout much of rural Alaska, where residents face unparalleled access challenges, are acutely reliant on the State's resources, and regularly use the State's waterways as transportation thoroughfares. The State has a powerful interest in preserving its authority to manage its lands as Congress intended, freely using

its lands and waters for scientific study and other beneficial uses, and protecting the Alaskans who rely on access to and use of the State's lands and waters to provide for their families.

INTRODUCTION

The Alaska National Interest Lands Conservation Act sought both to "provide[ ] sufficient protection for the national interest in the scenic, natural, cultural, and environmental values on the public lands in Alaska, and at the same time provide[ ] adequate opportunity for satisfaction of the economic and social needs of the State of Alaska and its people." 16 U.S.C. §3101(d). ANILCA dedicated over 100 million acres of federal land – an area larger than California – for conservation and protection. 16 U.S.C. §§3101 *et seq.* It organized vast swaths of Alaska's new and expanded national parks, wildlife refuges, wild and scenic rivers, national trails, wilderness preservation systems, and national forest monuments into conservation system units ("CSUs") managed by different federal land management agencies. *Id.* §3102(4). Roughly forty percent of Alaska falls within an ANILCA CSU. Alaska's National Parks now make up two-thirds of the National Park System's entire acreage,[1] and the federal government owns over sixty

[1] In addition, approximately eighty-six percent of the total land area administered by the United States Fish and Wildlife Service and nearly one-third of the land area administered by

(Continued on following page)

percent of all land in Alaska – making it the largest landowner in the state.

Congress understood that many nonfederal lands fell within CSU boundaries; realized that Congress's massive land grant to Alaska at statehood reflected the State's unique need to manage and develop its resources to meet the costs of statehood; that Alaskans confront unique geographic, climactic, and economic challenges; and that Alaska needed to retain its authority to manage its own lands to provide for its people. While ANILCA reserved and placed massive amounts of public land into conservation status – significantly constraining Alaska's future economic development – it also included multiple provisions intended to protect Alaska's sovereign authority over the land it owns itself. *See id.* §§3103, 3111-14, 3202, 3207. Most important, Congress balanced federal conservation goals and the importance of State self-determination through §3103(c) ("§103(c)"), which provides:

> Only those lands within the boundaries of any conservation system unit which are public lands (as such term is defined in this Act) shall be deemed to be included as a portion of such unit. No lands which, before, on, or after the date of enactment of this Act, are conveyed to the State, to any Native Corporation, or to any private party shall be

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the Bureau of Land Management is in Alaska. The attached appendix shows those lands.

> subject to the regulations applicable solely to public lands within such units. If the State, a Native Corporation, or other owner desires to convey any such lands, the Secretary may acquire such lands in accordance with applicable law (including this Act), and any such lands shall become part of the unit, and be administered accordingly.

This section ensured that nonfederal "lands" falling within newly expanded park boundaries – defined to include State waters like the Nation River – would not be treated and managed as if they were federally owned public lands. *Id.* §§3102(1), 3103(c).

Petitioner John Sturgeon was operating a small personal hovercraft on a State-owned navigable waterway, the Nation River, as Alaska law allows. While on a gravel bar, he was approached by armed Park Service officials and threatened with criminal citation for violating a nationwide Park Service ban on hovercraft use. In considering Mr. Sturgeon's challenge to that regulation below, the Ninth Circuit acknowledged that the first sentence of §103(c) instructs that State, Native, and private owned lands are not to be deemed a part of a CSU. But it refused to give meaning to the second sentence, which confirms that because nonfederal lands are not a part of CSUs, federal land management agencies have no authority to manage them as if they were. Instead, the court construed the language to mean nonfederal land within CSUs were exempt from only "[Alaska] CSU-specific regulations." Pet. App. 24a. Because the

hovercraft ban applied to all Park Service lands and waters nationwide – including "navigable waters without regard to the ownership of submerged lands, tidelands, or lowlands," 36 C.F.R. §§1.2(a)(1), (3) – and not "solely" to Alaska CSU public lands, the court held the regulation did not violate ANILCA. Pet. App. 25a-26a.

SUMMARY OF ARGUMENT

This case asks whether §103(c) of ANILCA explicitly authorizes the National Park Service – or any other federal land management agency – to usurp the State of Alaska's sovereign right to manage state-owned lands and waters in Alaska, and to similarly seize management authority over Native Corporation and privately owned lands. It does not.

In concluding otherwise, the Ninth Circuit ignored Congress's decision to explicitly exclude non-federal lands from CSUs and to curtail the Park Service's jurisdiction over those nonfederal lands. Under the Ninth Circuit's decision, the Park Service can seize jurisdiction over Native inholdings, State lands or riverbeds, or private homesteads lying within a Park Service boundary even though those lands are not a part of a CSU, simply by promulgating nationwide regulations. This decision impedes Alaska's sovereignty and overhauls ANILCA, to Alaska's detriment. It also contradicts the language of §103(c), in

which Congress endeavored to preserve Alaska's authority to manage its lands.

Alaska has a sovereign right to and interest in managing its lands and waters. It owns the riverbed of the Nation River and other navigable rivers like it as a matter of constitutional grace by virtue of the equal footing doctrine. Alaska's sovereign ownership of its submerged lands also includes the right to regulate its waters. The Ninth Circuit's misreading of §103(c) ignores Alaska's ownership of its submerged lands. In so doing, the decision usurps the state's traditional authority to control its resources. By permitting the Park Service to control lands and waters it does not own and holds no title to, this decision hinders Alaska's power to assure continued access to its resources for its people.

The alarming federalism consequences stemming from this decision have unique and real consequences for Alaskans. Alaska's control over its abundant resources has been a central compact of its sovereignty since statehood, and access to those resources is critical for many of its residents. For rural Alaskans living in remote villages unconnected to the road system, use of and access to the state's lands and waters provide a food source, an important means of travel across a remote territory, and an opportunity to supplement income through localized resource-based activities. Alaska's waters form a unique part of this way of life and often provide critical access routes across the vast, varied terrain. The Ninth Circuit's decision thus threatens not only the State's

sovereignty – even requiring it to ask for a permit from a federal agency to access and use its own resources – but also the way of life of ordinary Alaskan citizens. And the Park Service is actively working to expand the scope of the Ninth Circuit's ruling, already proposing regulations that rely solely on the court's ruling to further expand its jurisdiction over nonfederal lands.

All of these harms are rooted in the Ninth Circuit's fundamental misreading of §103(c). Rather than understanding the plain and precise statutory text to mean what it says – State, Native, and private lands are not federal lands, and cannot be managed as though they were – the Ninth Circuit misread the statute. The court's untenable interpretation of §103(c) creates a distinction between a national and Alaska-specific management regime that is not part of the provision's text. This interpretation not only misreads the plain text of the statute, but also contradicts the law's basic purposes, transforming a provision designed to preserve Alaska's sovereignty into one that undermines it. The Ninth Circuit's ruling flies in the face of congressional intent that ANILCA's inclusion of nonfederal inholdings within CSU boundaries "does not alter in any way the ability of the State or Natives to do what it will with those lands." 125 Cong. Rec. 11158 (1979) (statement of Rep. Seiberling). It gives the Park Service more authority over nonfederal lands than federal ones, and it allows the Park Service to regulate State, Native, and private lands on a nationwide basis, but not on a

statewide one – despite the fact Congress crafted ANILCA to create Alaska-specific rules for land use and management. Such an unreasonable interpretation, and one that does such damage to Alaska's sovereignty, is entitled to no deference and should be rejected. This Court should reverse the Ninth Circuit's decision and give effect to ANILCA's guarantees that State, Native, and private landowners would maintain control over the lands and waters that they own.

ARGUMENT

I. The Ninth Circuit's Decision Deprives Alaska Of Its Sovereign Prerogative To Manage Its Lands And Waters Consistent With The Needs Of Its People.

The Ninth Circuit's decision deprives Alaska and its people of the benefit of the bargain that ANILCA struck. It transfers state decision-making authority over how best to responsibly manage Alaska's lands to a federal agency. And it blesses the Park Service's decision to regulate nonfederal lands in Alaska whenever it wants. This decision usurps Alaska's rightful authority to manage its own lands, including the waters flowing over submerged lands to which the state was granted title at statehood. And it hampers the State's ability to meet the exceptional needs of Alaskans, who face unparalleled transportation, economic, and social challenges. The Ninth Circuit's decision thus strikes at the heart of Alaska's sovereignty

and upsets the usual federal-state balance. In so doing, it inflicts real harms on Alaskans, for whom open access to and use of Alaska's rich resources are essential to their way of life.

A. Alaska's ownership of its lands and waters is an essential aspect of its state sovereignty.

Authority to manage its lands and waters is a particularly important sovereign interest to the State of Alaska, inextricably tied to its history and self-governance. The drive to secure local management of Alaska's resources lay at the very genesis of its statehood: Alaskans' interest in controlling the State's fisheries without unwarranted federal control was a principal motivation for statehood. *See Metlakatla Indian Community v. Egan*, 369 U.S. 45, 47 (1962). But the territory's lack of taxable industry and population stood in the way: "[o]ne of the principal objections to Alaska's admittance into the Union was the fear that the territory was economically immature and would be unable to support a state government." *Trustees for Alaska v. State of Alaska*, 736 P.2d 324, 335 (Alaska 1987). Ultimately, "[t]he congressmen who favored statehood . . . maintained that the Statehood Act sufficiently provided for Alaska's financial well-being. The land grant of 103,350,000 acres was perceived by these congressmen as an endowment which would yield the income that Alaska needed to meet the costs of statehood." *Id.* at 336. The "unprecedented size" of the land grant accounted for the fact

that "the federal government had already reserved the most valuable land and the new state would, in effect, have second choice" and that lands available for state selection were "only marginally productive." *Id.* at n.23 (citations omitted). In 1971, when Congress conveyed 44 million acres of federal land and its subsurface estate to support Alaska's Native peoples under the Alaska Native Claims Settlement Act, that conveyance also had development importance for Alaskans. *See* 43 U.S.C. §§1601 *et seq.*; *City of Saint Paul, Alaska v. Evans*, 344 F.3d 1029, 1031 (9th Cir. 2003).

Alaska's constitutional delegates viewed state management of the anticipated grant of land and resources as a serious sovereign responsibility. They drafted an entire natural resources article in the Alaska Constitution – Article VIII – with provisions designed to preserve and protect the State's lands, waters, and other resources while allowing for responsible access and use, including sections reserving the State's resources to the people "for maximum use consistent with the public interest"; managing the state's replenishable resources on the sustained yield principle; and ensuring free access to Alaska's navigable and public waters. Alaska Const. art. VIII, §§1-4, 14. And as anticipated at statehood, Alaskans have indeed funded their state government – including executive agencies that provide public programs and benefits, a court system, and the state legislature

– primarily by using the land and resources the State holds for this purpose.[2]

The importance of retaining the State's authority to carry out these responsibilities is magnified by the size of the federal government's role in Alaska. Alaska takes up an area one-fifth the size of the lower forty-eight states, encompassing the largest intact temperate rainforest in the world – equal to the size of West Virginia – and a northern coastal tundra bigger than Kansas. The federal government possesses almost two-thirds of all land. Alaska's federal lands are larger in area than fifteen eastern seaboard states, from Maine to South Carolina, combined. This extraordinary concentration of federal ownership means that any nationwide Park Service regulation will disproportionately affect Alaskans. But it also underscores the relevance of continued State management of state resources.

In addition to the State's interest in its vast lands, Alaska has a sovereign interest in its navigable waters. Alaska owns the riverbed of the Nation River, where Mr. Sturgeon was approached by armed federal officials. *See Alaska v. United States*, 201 F.3d 1154, 1164-66 (9th Cir. 2000). Alaska, like all states, took title to the lands underlying its inland navigable waters as a matter of constitutional grace by virtue of

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[2] *See* Alaska Department of Revenue, Revenue Sources Book (2015 Spring), http://tax.alaska.gov/ programs/documentviewer.aspx 1143r/.

the equal footing doctrine, codified by the Submerged Lands Act. *Alaska v. United States*, 545 U.S. 75, 79 (2005) (citing 43 U.S.C. §§1301 *et seq.*, §1311(a); Alaska Statehood Act, Pub. Law No. 85-508, 72 Stat. 339 §6(m) (1958) (incorporating Submerged Lands Act)); *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel*, 429 U.S. 363, 374 (1977) ("[T]he state's title to lands underlying navigable waters within its boundaries is conferred not by Congress but by the Constitution itself.").[3]

Alaska's ownership of its submerged lands includes the right to regulate the waters for its people. Indeed, that is the entire purpose of state ownership of submerged lands. A State's title to land underlying navigable waters gives it "the right to control and regulate navigable streams." *Coyle v. Smith*, 221 U.S. 559, 573 (1911); *see also* 43 U.S.C. §1311(a) (defining the rights of states to include "ownership of the natural resources within such lands and waters" and the "right and power to manage, administer, lease, develop, and use said lands and natural resources all in accordance with applicable State law."). States hold the lands in trust for the public to use the waterways for commerce, navigation, and fishing. *Illinois Central R.R. Co. v. Illinois*, 146 U.S. 387, 452 (1892) (holding state's title to lands under navigable waters

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[3] The State agrees with and joins in petitioner's argument that when title to its submerged lands passed from the United States to Alaska at Statehood, it was "conveyed to the State" for purposes of §103(c). *See* Pet. Br. at 33-35.

"necessarily carries with it control over the waters above them"). The Alaska Constitution protects Alaskans' rights to access and use the State's waters, Alaska Const., art. VIII §§1, 3, 6, 14, and state statutes further provide that Alaska "holds and controls all navigable or public water in trust for the use of the people of the state." Alaska Stat. §38.05.126(b); *see also* Alaska Stat. §§38.05.127-.128.

Allowing the Park Service to broadly usurp the State's control over its navigable waters, regardless of Alaska's ownership of its submerged lands, therefore would impede the State's sovereignty. *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 284 (1997) (acknowledging "navigable waters uniquely implicate sovereign interests"); *United States v. Alaska*, 521 U.S. 1, 5 (1997) (holding that ownership of submerged lands "is an essential attribute of sovereignty"). Such a federal takeover would thwart the public trust doctrine and hinder Alaska's sovereign power to ensure open access to its waters for purposes of navigation, fishing, and commerce. *See Illinois Central R.R. Co.*, 146 U.S. at 452. And given Alaska's ownership of its submerged lands under these principles, there can be no reasonable claim that they, or the waters above them, are "public lands" within the meaning of ANILCA.[4] Sections 102(2)-(3) of ANILCA defines

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[4] The Ninth Circuit's analysis in *Alaska v. Babbitt*, 72 F.3d 698 (9th Cir. 1995) ("*Katie John*"), would not require a different outcome in this case even if it were a part of the question presented, and even if this Court were bound by a circuit court's

(Continued on following page)

"public land" as lands to which the United States holds title after December 2, 1980, excluding lands selected by Alaska or Native Corporations or other nonfederal lands under the Alaska Native Claims Settlement Act. Alaska's lands and waters do not fall into this category.

B. Loss of Alaska's Sovereign Power to Regulate its Own Lands and Waters Will Inflict Serious Harms on Ordinary Alaskans.

Alaska's sovereign interests in its lands and waters are not merely academic. The loss of State management authority inflicts real and unique harms on not just the State, but on ordinary Alaskans. The state's vast territory is sparsely populated, with more caribou than people. Roughly twenty percent of Alaskans live in regions unconnected to the road system; half of these residents live in Alaska's most

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decision – which of course it is not. In *Katie John*, the Ninth Circuit held that "public lands include some specific navigable waters" as a result of the reserved water rights doctrine for the sole purpose of administering ANILCA's rural subsistence priority. *Id.* at 704. But the court explicitly cautioned that its holding was limited to those portions of ANILCA "necessary to give meaning to [ANILCA's] purpose of providing an opportunity for a subsistence way of life." *Id.* at 702 n.9. This case does not concern subsistence or the subsistence-related portions of ANILCA, so *Katie John* is inapplicable. The *Katie John* court remained convinced that "ANILCA does not support [ ] a complete assertion of federal control" over Alaska's navigable waters. *Id.* at 704.

remote villages. For these rural Alaskans, daily life means dealing with limited infrastructure, few transportation options, harsh weather, limited services, and scarce job opportunities. Residents confront disproportionately higher levels of poverty; some lack essential services like water and sanitation. Localized resource-based activities such as local tourism and recreation related jobs or small-scale sport fishing, wildlife guiding, and trapping often provide a vital part of families' incomes and significantly contribute to the economic activity of remote regions.

In addition, the State's waters – including over 12,000 rivers and three million lakes – provide essential travel corridors for many Alaskans who use personal skiffs and other small craft. Major rivers like the Yukon and Kuskokwim serve as critical arteries for transporting fuel and other essential daily goods to residents in western Alaska throughout warmer months. In winter, rivers become frozen highways and remain part of Alaska's transportation infrastructure, allowing travel by all-terrain vehicle, snowmachine, pick-up truck, and dogsled. For the State's most rural residents in particular, the ability to access and use Alaska's resources is critical.

ANILCA reflects this unique reality. Considered in proper context, §103 is best viewed as an attempt to reconcile and balance potentially conflicting visions: the advantages of increased federal government ownership of nationally significant public land, on one hand, and the need for continued State management of nonfederal lands to allow for State growth

and prosperity, on the other. Congress believed that ANILCA was "both a fair and equitable resolution of competing claims for protection and development" of Alaska's lands and cautioned that "the delicate balance between competing interests which is struck in the present bill should not be upset in any significant way." S. Rep. 96-413, 135, *reprinted in* 1980 U.S.C.C.A.N. 5070, 5080. As a result of this balancing of interests, ANILCA preserves Alaska's sovereign ability to manage its lands and waters for the benefit of its people in several ways.

First, Congress assured in the statement of purpose that the Act would provide "adequate opportunity for satisfaction of the economic and social needs of the State of Alaska and its people." §3101(d). Second, §103(c) imposes boundary limitations and a corresponding restraint on federal regulatory authority. Third, other provisions of the Act reinforce Alaska's reservation of its traditional land management authority: §3202(a) provides that "[n]othing in this Act is intended to . . . diminish the responsibility and authority of the State of Alaska for management of fish and wildlife on the public lands," and §3207 ensures that "[n]othing in this Act shall be construed as . . . expanding or diminishing Federal or State jurisdiction, responsibility, interests, or rights in water resources development or control." 16 U.S.C. §3207.

These provisions were intended to allow Alaska to make policy choices and to help assure access to the State's lands and waters free from unwarranted federal interference – even in ways that appear odd

in other areas of the country.[5] Prohibiting all-terrain vehicle traffic in small national parks throughout much of the country might create a quieter experience for an afternoon snowshoeing enthusiast or minimize safety concerns to other park visitors on recreational trails. *See* 36 C.F.R. §§1.4(a), 4.10. But in Alaska, barring such use on frozen rivers could prevent families from restocking essential fuel supplies or bartering for important winter provisions in nearby villages. Limiting commercial activity might safeguard the pristine character of most national parks, but applying those restrictions on major Alaska navigable waters like the Yukon or Kuskokwim rivers would cripple local industries like commercial fishing or tourism in and around Native villages. *See* 36 C.F.R. §5.3. Nationwide access restrictions applied to Alaska would impede winter ice road traffic, threaten the flow of goods and services to remote communities along the State's rivers, exacerbate the high cost of

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[5] Although ANILCA does not authorize the Park Service or any other federal agency to unilaterally seize control over State, Native, and privately owned lands and waters, Congress itself might have the authority to do that, if it did so consistent with the Property and Commerce Clauses. *See United States v. Lindsey*, 595 F.2d 5, 6 (9th Cir. 1979) (holding that the Property Clause "grants to the United States power to regulate conduct on non-federal land when reasonably necessary to protect adjacent federal property or navigable waters"). But neither clause gives the *Park Service* the wide-ranging plenary authority over nonfederal lands endorsed under the Ninth Circuit's decision, in the absence of Congress's explicit command.

living in rural Alaska, and chill Native corporations' ability to develop their land.

Even the hovercraft ban exposes a pitfall of applying a nationalized land management scheme: while using a small, low-draft personal craft to travel is a far cry from the reality of many Americans, in Alaska it provides a realistic means of water access in rugged, isolated regions of the State. In fact, Congress acknowledged Alaska's unusual need for atypical access options, including hovercraft use. Title XI of ANILCA, which provides for a consolidated application process for transportation and utility systems in and across CSUs, anticipates accommodation of "air cushion vehicles" – hovercraft. §1102(4)(B)(vi).

It makes little sense for Congress to acknowledge Alaska's exceptional challenges – including the State's nascent infrastructure, unusual transportation realities, and unparalleled resource needs – yet simultaneously shoehorn vast tracts of nonfederal land into a monolithic regulatory scheme ill-suited to Alaska's individuality. But the Ninth Circuit's interpretation of §103(c) does exactly that. By wresting land management decisions away from the State despite congressional intent to respect Alaska's uniqueness, the Ninth Circuit bypassed the "well-established principle that States do not easily cede their sovereign powers, including their control over waters within their own territories." *Tarrant Reg'l Water Dist. v. Herrmann*, 133 S. Ct. 2120, 2123 (2013).

The impact of the loss of these principles in Alaska extends well beyond Mr. Sturgeon. The Park Service's own actions, many of which were brought to light in the State's companion case below, further illustrate the initial wave of overreach this decision allows. In 2010, the State of Alaska was forced to obtain a scientific research and collecting permit to conduct genetic sampling on chum salmon in the Alagnak River, a State-owned navigable river, even though the State's activities occurred on its own lands and waters. The permit terms also declared – despite the State's ownership of its submerged lands and ownership of resources in its navigable waters – that all samples collected and the results of the research using those samples were the property of the federal government. In 2009, the Alaska Department of Fish and Game was forced to obtain a permit to continue a decades-long study of the Western Arctic caribou herd, despite the fact that the collaring and tissue collection were conducted entirely from the navigable, State-owned Kobuk River. Requiring the State to ask for permission from the federal government before accessing its lands to carry out beneficial scientific study unduly interferes with Alaska's ability to make use of its resources. Yet the Park Service mandates that Alaska sacrifice its sovereign dignity and beg, hat in hand, to conduct scientific research on State land.

In opposing the petition for certiorari, the Solicitor General sought to minimize these harms, framing the Ninth Circuit's decision as concerning "limited

regulations in effect on navigable waters in national parks within Alaska." BIO 22. The Park Service claimed that the scope of the Ninth Circuit's decision concerned only navigable waters and "did not hold that the Secretary may enforce nationwide parks regulations on such privately-held, state-held, or Native-held lands in the future" because "[a]ny such regulation would need to be based on an independent grant of regulatory power." BIO 21-22. And it assured that expanding the Park Service's regulatory reach in Alaska would require "dramatic[] shifts [in] its regulatory approach." BIO 22. But the Solicitor General is wrong. There is nothing "limited" about the Ninth Circuit's decision or its impacts. And the Park Service is now attempting to augment its authority on the basis of the decision, even while downplaying the ruling's broad reach.

The Park Service is in the process of expanding the scope of its *Sturgeon* jurisdiction in Alaska beyond the State's waters. It has *already* proposed regulations that extend its reach onto private, State, and Native owned lands within the borders of Alaska CSUs, publishing proposed revised national regulations governing nonfederal oil and gas activities within Park Service units (36 C.F.R. §9(b)) in the federal register on October 26, 2015. Under current regulations, Alaska is exempted from oil and gas regulations on the basis that ANILCA §1110(b) governs access to inholdings. But the new proposed regulations eliminate the Alaska exemption, extending Park Service regulatory jurisdiction over oil and gas

to all lands within CSUs regardless of ownership. In support of this jurisdictional expansion, the Park Service bases its newly claimed authority on *nothing more than the Ninth Circuit's decision below*:

> We also note that because these regulations are generally applicable to NPS units nationwide and to non-federal interests in those units, they are not "applicable solely to public lands within [units established under ANILCA]," and thus are not affected by section 103(c) of ANILCA. *See Sturgeon v. Masica*, 768 F.3d 1066, 1077-78 (9th Cir. 2014).

80 Fed. Reg. 65571, 65573 (proposed Oct. 26, 2015). This action reveals the breadth and ongoing impact of the Ninth's Circuit's decision.

The Park Service's eagerness to utilize the Ninth's Circuit's ruling – rather than congressional authorization – as a basis for further federalization of nonfederal lands brings to mind this Court's caution against accepting an agency's "expansive theory" of jurisdiction that "rather than preserv[ing] the primary rights and responsibilities of the States, would [bring] virtually all plan[ning of] the development and use . . . of land and water resources by the States under federal control." *Rapanos v. United States*, 547 U.S. 715, 737 (2006) (internal quotation marks omitted; alterations and omissions in original). This Court has disallowed "extensive federal jurisdiction urged by the Government [that] would authorize the [agency] to function as a *de facto* regulator of immense

stretches of intrastate land – an authority the agency has shown its willingness to exercise with the scope of discretion that would befit a local zoning board." *Id.* at 738. It should likewise prevent that overreach here.

The Ninth Circuit encouraged nationalized land management decisions and handed a federal land management agency unprecedented control over lands that, unlike the vast majority of lands in Alaska, do not belong to the federal government. Regardless of how broadly the Park Service extends its regulatory arm, §103(c) no longer cabins federal jurisdiction or assures any meaningful balance of federal and State land management authority. State, Native, and private property owners are now subjected to unwarranted federal control. Because Alaska contains nearly two-thirds of the Park Service's lands as part of the State's complex patchwork of land ownership, any regulation of purported nationwide applicability will disproportionately impact Alaska. Any time a federal land management agency disagrees with Alaska's approach to managing its own lands, it need only pass a nationwide regulation to usurp the State's regulatory scheme. Be it in effect or by design, the result of this decision is to dramatically enhance the federal administrative state's power. This Court should reverse the Ninth Circuit's ruling to reinstate ANILCA's careful balance between State and federal control.

II. ANILCA §103 Exempts Nonfederal Lands from Federal Park Management Regulation.

The harms flowing from the Ninth Circuit's decision and the loss of the State's sovereignty all stem from the Ninth Circuit's flawed reading of §103(c). The Ninth Circuit interpreted §103(c) to mean that "only public land lying within a CSU's boundaries may be subjected to *CSU-specific regulations*," but that Park Service regulations of general applicability – those that apply both inside and outside of Alaska – properly governs all nonfederal lands within Alaska CSUs. Pet. App. 24a (emphasis in original). It then held that because the Park Service's hovercraft ban applies to all Park Service lands and waters nationwide – even "navigable waters and areas within their ordinary reach . . . without regard to the ownership of submerged lands, tidelands, or lowlands" (citing 36 C.F.R. §1.2(a)(3)) – the ban did not apply "solely" to Park Service lands in Alaska and thus did not violate ANILCA. Pet. App. 25a-26a. The Ninth Circuit was wrong, and application of traditional statutory interpretation tools show why.

The court misread §103(c)'s plain language and disregarded its context, while simultaneously ignoring legislative history. But the text, context, and congressional intent surrounding §103(c) are clear: nonfederal lands are not to be regulated as if they were a part of a CSU and are not to be subject to the innumerable federal regulations that apply nationwide. Even if §103(c) were ambiguous, however, the Park Service's interpretation of that provision is not

entitled to any deference. The Park Service's view of §103 intrudes upon Alaska's sovereignty in the absence of clear congressional intent to alter the traditional federal-state balance of land management, and it should be rejected.

A. The plain language of §103(c) exempts State, Native Corporation, and privately owned land within CSUs from being regulated as though they were federal lands.

Interpreting a statute begins with its text. *BP America Prod. Co. v. Burton*, 549 U.S. 84, 91 (2006). The Ninth Circuit's interpretation of §103(c) contravenes the plain meaning of the statute, which, properly read, is straightforward and sensible.

Section 103(c) has three sentences, which work in tandem. The first states that CSUs, by definition, include only federal lands: "Only those lands within the boundaries of any conservation system unit which are public lands (as such term is defined in this Act) shall be deemed to be included as a portion of such unit." ANILCA §§102(2)-(3) define "public land" as lands to which the United States holds title after December 2, 1980, and expressly excludes lands selected by Alaska or Native Corporations or other nonfederal lands under the Alaska Native Claims Settlement Act. Thus, the first sentence of §103(c) makes clear that nonfederal lands physically located within CSU boundaries are not considered to be part of any CSU.

Section 103(c)'s second sentence then limits the federal agencies' ability to regulate nonfederal lands within a CSU: "No lands which, before, on, or after December 2, 1980, are conveyed to the State, to any Native Corporation, or to any private party shall be subject to the regulations applicable solely to public lands within such units." The third sentence reinforces this limitation, providing that nonfederal lands can become public – and thus subject to plenary federal regulation – only if they are conveyed to the federal government: "If the State, a Native Corporation, or other owner desires to convey any such lands, the Secretary may acquire such lands in accordance with applicable law (including this Act), and any such lands shall become part of the unit, and be administered accordingly."

The "plain and precise language," *Mansell v. Mansell*, 490 U.S. 581, 589 (1989), of the three sentences of §103(c) work together: the first defines which lands are part of Alaska CSUs and which – specifically State, Native, and privately owned lands – are not. The second confirms that federal land management agencies have no authority to manage those nonfederal lands that are not a part of the CSU. The third provides that the government can acquire management authority over those nonfederal lands, but only if they first become "public [federal] lands" through conveyance or operation of law. Section 103(c) thus operates as a cohesive whole, sensibly maintaining traditional private property ownership and State management rights and limiting the federal

government's power over private, State, and Native-owned lands.

The Ninth Circuit's interpretation of the law turns this provision on its head. The court correctly understood the first sentence of §103(c), recognizing that the exclusion of nonfederal lands from ANILCA's definition of "public lands" "does not in any way change the status of that State, native, or private land" within the CSU boundaries. Pet. App. 23a (quoting 125 Cong. Rec. 11158 (1979)). But its interpretation of the second sentence undermined that very principle by misreading the language of the provision.

In considering the second sentence of §103(c), the Ninth Circuit focused on the word "solely." In the court's view, the word "solely" modified "public lands within [Alaska CSUs]," rather than "public lands" generally. Pet. App. 25a-26a. Under the Ninth Circuit's interpretation, nonfederal lands could then be subjected to the regulations in 36 C.F.R. Part 2 – like the hovercraft ban – because they applied nationwide, not *only* to Alaska CSUs. The court concluded that "[b]ecause of its general applicability, the regulation may be enforced on both public and nonpublic [nonfederal] lands alike within CSUs." Pet. App. 26a.

The Ninth Circuit's interpretation makes little sense. As used in §103(c), "solely" properly modifies "public lands." Following the lead of the first sentence, which directs that nonfederal lands are not a part of CSUs, the second sentence confirms the

federal government cannot regulate them as if they were. Read this way, the second sentence restricts the application of federal land management regulations "[exclusively] to public lands" inside the CSUs. It quarantines federal regulatory jurisdiction to only those lands deemed to be part of a CSU, meaning public, federally owned lands. But by misinterpreting "solely," the Ninth Circuit conflated the meaningful distinction between federal and nonfederal lands and construed the second sentence to give the Park Service expansive power over lands that are neither a part of a CSU nor federally owned.

The court's fixation on the second sentence of §103(c) fails to give proper meaning to §103(c)'s first sentence, which exempts nonfederal lands from even being deemed a part of a CSU. It would make no sense for Congress to explicitly instruct that nonfederal lands are not a part of a CSU – regardless of their location – but then subject those lands to nationwide public lands management regulations as if they were. Similarly, the Ninth Circuit's myopic focus on the second sentence of §103(c) largely negates the meaning of the third sentence, which provides that nonfederal lands can "become part of the unit, *and be administered accordingly*" only upon formal transfer to the United States. (Emphasis added.) While the first sentence states that nonfederal lands within CSU boundaries are not part of the CSUs, the third sentence forbids those nonfederal lands from being administered like CSU lands unless and until they are conveyed to the United States. It is difficult, if not

impossible, to harmonize these commands with the Ninth Circuit's view of the middle sentence – which would allow the Park Service to exert management control over lands that are: (1) not public lands; and (2) have not been conveyed to the United States.

The Ninth Circuit failed to offer any explanation for this anomaly, or to explain how its interpretation squares with the third sentence. Under the Ninth's Circuit's interpretation, the Park Service is free to administer Alaska's nonfederal lands whether or not they have been conveyed to the United States as long as it promulgates a nationwide regulation. This interpretation undermines the meaning and manner in which each sentence of §103(c) work toward the same goal and violates the "canon against interpreting any statutory provision in a manner that would render another provision superfluous." *Bilski v. Kappos*, 561 U.S. 593, 607-08 (2010).

B. ANILCA's context and structure confirm that the Park Service cannot regulate nonfederal lands within Alaska CSUs.

The Ninth Circuit's interpretation of §103(c) not only misreads the plain meaning of its text. It also contravenes the canon that statutory construction is a "holistic endeavor" requiring the statute to be read as a whole. *E.g.*, *U.S. Nat'l Bank of Oregon v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 455 (1993) (citations omitted). This Court has emphasized that

"[i]n expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." *Id.* at 455 (citing numerous cases). Instead, "reasonable statutory interpretation must account for both the specific context in which . . . language is used and the broader context of the statute as a whole." *Utility Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2442 (2014) (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)) (internal quotation marks omitted). These principles are fatal to the Ninth Circuit's interpretation of §103(c).

The Ninth Circuit's reading violates the whole-text canon not only because it focuses on the second sentence of §103(c) without meaningfully considering the first and third. On a broader level, the Ninth Circuit's reading fundamentally ignores ANILCA's context: it is an Alaska-specific law rooted in Alaska's uniqueness and the need for specialized management of its public lands. Viewing the second sentence of §103(c) in isolation, the court permits the Park Service to exert regulatory control over nonfederal lands within Alaska CSUs, so long as it does so through regulations of general applicability and discounts Alaska's specific needs and circumstances. But ANILCA's very existence is grounded in Alaska's specific needs and circumstances. This law and its "predecessor statutes, the [Alaska] Statehood Act and ANCSA," are, by definition, state-specific. *Amoco Prod. Co. v. Vill. of Gambell, Alaska*, 480 U.S. 531, 552 (1987). ANILCA acknowledged that Alaskans

confront unusual challenges due to the State's geography, climate, diffuse population, and largely rural character. It did so by providing select access protections and authorizing the use of snowmachines, motorboats, and airplanes on federal CSU lands in Alaska for traditional activities and travel to and from villages and homesites. 16 U.S.C. §3170.

Congress also recognized that Alaskans had unique economic and subsistence needs, and that the State's resources were its economic foundation. *Id.* §§3101(d), 3111-26. Thus, Congress's statement of purpose acknowledges that ANILCA furthered conservationist goals but also "provided adequate opportunity for satisfaction of the economic and social needs of the State of Alaska and its people." *Id.* §3101(d); *see also City of Angoon v. Marsh*, 749 F.2d 1413, 1415-16 (9th Cir. 1984) ("Congress became aware of the need for a legislative means of maintaining the proper balance between the designation of national conservation areas and the necessary disposition of public lands for more intensive private use. Thus, ANILCA was passed. . . .").

Accepting the Ninth Circuit's interpretation of §103(c) and adopting its view that the Park Service has unbridled authority to regulate private land also leads to a peculiar friction with ANILCA's other provisions. In some cases, it would mean that the Park Service has greater authority to regulate nonfederal lands than public ones. For example, ANILCA restricts the Park Service's ability to limit Alaskans' transportation across federal conservation system

units. On those federal lands, the Park Service cannot prohibit travel by plane or snowmachine "for traditional activities" or "travel to and from villages and homesites" without making findings that the access is damaging to the unit, and providing notice and a hearing. 16 U.S.C. §3170(a). But the Park Service now claims the authority to go much further: under the Ninth Circuit's view of 36 C.F.R. §1.2, the Park Service could ban such travel on nonfederal lands within CSUs through a self-granted regulatory authority – and without making those findings. The impact of the Ninth Circuit's ruling thus unreasonably allows the Park Service to provide less access, and less process, on nonfederal lands than on federal ones. But Congress intended §103(c) to preserve, not diminish, State and Native land ownership rights.

Another anomalous effect of the Ninth Circuit's decision is that nonfederal land located within Alaska CSUs would not only be subject to nationwide Park Service regulations – they would also be *exempt* from Alaska-specific regulations. After all, under the Ninth Circuit's reading of §103(c), regulations designed specifically for, and applicable "solely" to, Alaska CSUs are inapplicable to nonfederal CSU lands. But Alaska-CSU specific regulations generally provide freedom from the more rigid national land management regulations, in recognition of Alaska's unique cultural and geographic features. They implement ANILCA's protections for hunting, trapping, and motorized access within national parklands by presumptively allowing various activities the Park Service's nationwide

regulations would otherwise restrict, like the use of bear spray, carrying of firearms, storage and caching of fuel, and use of temporary campsites. *See* 36 C.F.R. §§13.25, 13.30, 13.45, 13.182. It makes no sense to read §103(c) in a manner that subjects state, Native, or privately-owned land to nationwide regulation but permits only federal land to stand under the umbrella of an Alaska-specific regulatory regime.

The Park Service's interpretation of §103(c) thus not only allows the Park Service to subject nonfederal Alaska lands to nationwide rules that do not account for Alaska's unique terrain, climate, rural character, and social and economic needs. It also *prevents* the nonfederal lands from obtaining the benefit the Alaska-specific regulations provide. The Ninth Circuit did not and could not explain how this result squares with ANILCA's explicit goal of considering and providing for "the economic and social needs of the State of Alaska and its people." 16 U.S.C. §3101(d). The Ninth Circuit's reading of §103(c) is dissonant with ANILCA as a whole, and for that reason this Court should reject it.

C. ANILCA's legislative history confirms Mr. Sturgeon's reading of §103(c).

Section 103(c)'s text is clear, and the context of the provision confirms its plain purpose, so this Court's statutory analysis can stop there. "Given the straightforward statutory command, there is no reason to resort to legislative history." *United States v.*

Gonzales, 520 U.S. 1, 6 (1997). Even so, legislative history confirms that Congress never intended ANILCA to allow the Park Service or other land management agencies the authority to regulate nonfederal lands – under ANILCA itself, under the National Park Service's Organic Act, under the 1976 Park Service Improvement Act, or under any other pre-existing public lands legislation. To the contrary, during the drafting process ANILCA was clarified to "make clear beyond any doubt that any State, Native or private lands, which may lie within the outer boundaries of the conservation system unit are not parts of that unit and are not subject to regulations which are applied to public lands which, in fact, are part of the unit." 125 Cong. Rec. 11158 (1979) (statement of Rep. Seiberling). There was "no question" that ANILCA's inclusion of nonfederal inholdings within CSU boundaries "does not alter in any way the ability of the State or Natives to do what it will with those lands." *Id.*

Congress did draw a distinction between the types of laws and regulations that would apply on inholdings and those that would not. But it was not the Ninth Circuit's newly-created distinction between Alaska CSU-specific regulations and nationwide regulations. Congress drew a different line. ANILCA defined and preserved inholdings as private lands outside of and not subject to the United States' public lands management and control. These nonfederal inholdings were not to be subject to public lands management laws and regulations, but would continue to

be governed by generally-applicable laws *outside the public lands arena*. Thus, a 1979 Senate Report explains that inholdings within CSU boundaries – like nonfederal lands outside those boundaries – would remain subject to non-public lands laws like the Clean Water Act, the Clean Air Act, the Civil Rights Act, and any other generally-applicable federal legislation:

> Those private lands, and those public lands owned by the state of Alaska or a subordinate political entity, are not to be construed as subject to the management regulations which may be adopted to manage and administer any national conservation system unit which is adjacent to, or surrounds, the private or non-federal public lands. Federal laws and regulations of general applicability to both private and public lands, such as the Clean Air Act, the Water Pollution Control Act, U.S. Army Corps Of Engineers wetlands regulations, and other federal statutes and regulations of general applicability would be applicable to private or non-federal public land inholdings within conservation[ ] system units, and to such lands adjacent to conservation system units, and are thus unaffected by the passage of this bill.

S. Rep. 96-413, 303, *reprinted in* 1980 U.S.C.C.A.N. 5070, 5247. ANILCA's congressional advocates explained that "the boundaries drawn on the map for that conservation unit do[ ] not in any way change the status of that State, native, or private land or make it

subject to the any of the laws and regulations that pertain to U.S. public lands, so that these inholdings are clearly not controlled *by any of the public land laws* of the United States" but, at the same time, reassured Congress that §103(c) "is not an effort to amend the Clean Air Act or any of the other acts *that are not public lands laws*." 125 Cong. Rec. 11158 (1979) (emphases added). Taken together, this history reinforces the plain meaning of §103(c): ANILCA does not give the Park Service augmented authority to regulate nonfederal lands within CSU boundaries, but generally applicable laws retain their force and effect. Thus, when Congress wrote in §103(c) that no nonfederal lands "shall be subject to the regulations applicable solely to public lands," it used "solely" to distinguish between public land regulations – which do not apply on nonfederal land – and other types of generally applicable regulations – which do.

D. The Park Service's interpretation of §103(c) impinges on Alaska's right to regulate its lands absent clear congressional intent, and therefore conflicts with the clear statement doctrine and is not entitled to *Chevron* deference.

The Park Service may suggest that the expansive interpretation of §103(c) adopted by the Ninth Circuit is entitled to deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). This Court should reject any such claim. As an initial matter, where "the intent of Congress is clear,

that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43. This Court should give effect to the provision's plain meaning: State, Native, and privately owned lands and waters within the boundaries of CSUs are not federal public lands, and the Park Service may not regulate them as if they were. *See General Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 600 (2004) (explaining that "deference to [an agency's] statutory interpretation is called for only when the devices of judicial construction have been tried and found to yield no clear sense of congressional intent" and relying on "text, structure, purpose, and history" of ADEA to foreclose agency's interpretation). But even if ANILCA §103(c) were ambiguous or Congress's intent unclear, the Park Service's interpretation of the provision would not be entitled to deference. "[A]n agency interpretation that is inconsisten[t] with the design and structure of the statute as a whole" or otherwise unreasonable "does not merit deference." *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2442 (2014) (citation and internal quotation marks omitted). Because the Park Service's analysis of the second sentence of §103(c) fails to take into account the language of the rest of the subsection or context of ANILCA as a whole, the Park Service's interpretation falls into that category.

The significant and unwarranted encroachment onto Alaska's sovereignty discussed in Part I *supra* is another reason that this reading of the statute is not

entitled to any deference. The Ninth Circuit's reading of the statute significantly intrudes upon Alaska's sovereignty in the absence of clear Congressional intent to alter the traditional federal-state balance of land management. It therefore is not entitled to deference because it conflicts with the clear statement doctrine.

The clear statement doctrine is rooted in the assumption that "Congress does not exercise lightly" the "extraordinary power" to "legislate in areas traditionally regulated by the States." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). This Court therefore will not interpret a statute to "alter the usual constitutional balance between the States and the Federal Government," unless Congress has made "its intention to do so unmistakably clear in the language of the statute." *Id.* (quoting *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 65 (1989)) (internal quotation marks omitted). Any interpretation of a statute that infringes on state sovereignty must be "plain to anyone reading [it]." *Gregory*, 501 U.S. at 467. This rule is an "acknowledgement that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere." *Id.* at 461.

Because the Park Service seeks to override Alaska's traditional regulation of its own lands and navigable waters for the benefit of its citizens, there can be no question that the clear statement doctrine applies to this case. This Court confirmed the doctrine's application and vitality in *Solid Waste Agency*

of Northern Cook County v. U.S. Army Corps of Engineers, holding that the clear statement doctrine applied where federal regulation "would result in a significant impingement of the States' traditional and primary power over land and water use." 531 U.S. 159, 174 (2001). In *Solid Waste*, the Court held that the clear statement doctrine foreclosed the use of *Chevron* deference to authorize federal regulation of State waters where the proposed regulation was not clearly authorized by statute, would usurp traditional State sovereignty, and raised significant constitutional questions about the extent of federal authority. *Id.* at 172-73.

Contrary to the interpretation the Park Service advocates, §103(c) does not clearly allow it to regulate nonfederal lands within CSUs. Nothing in its text, context, or history suggests that Congress intended to transfer the State's "traditional and primary power over land and water use," *id.* at 174, to a federal land management agency. The Ninth Circuit erred in its interpretation of this law, and the Park Service is not entitled to *Chevron*'s shelter in defending it.

CONCLUSION

This Court should reverse the judgment of the Ninth Circuit.

Respectfully submitted,

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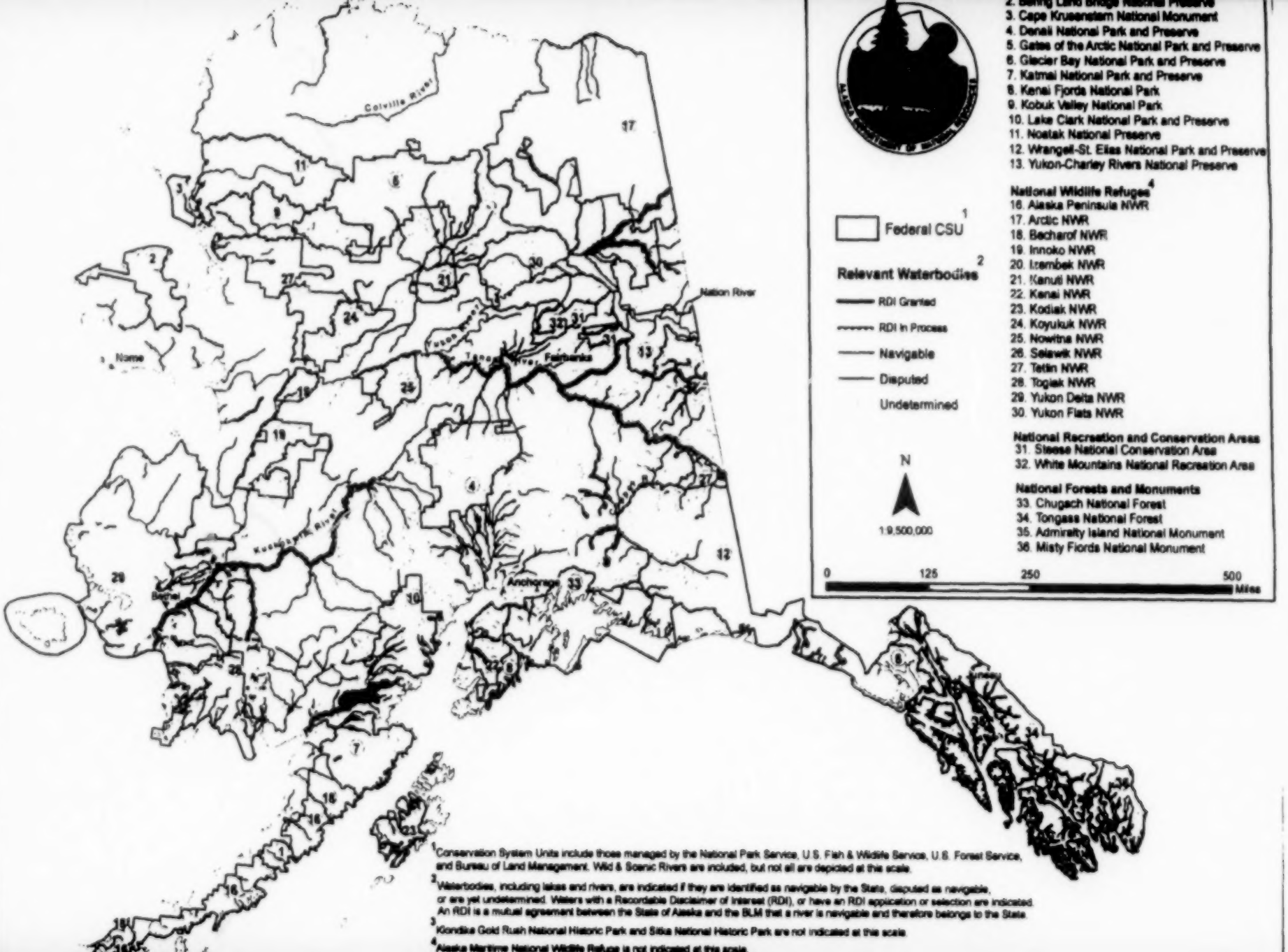

[1] Conservation System Units include those managed by the National Park Service, U.S. Fish & Wildlife Service, U.S. Forest Service, and Bureau of Land Management. Wild & Scenic Rivers are included, but not all are depicted at the scale.

[2] Waterbodies, including lakes and rivers, are indicated if they are identified as navigable by the State, disputed as navigable, or are yet undetermined. Waters with a Recordable Disclaimer of Interest (RDI), or have an RDI application or selection are indicated. An RDI is a mutual agreement between the State of Alaska and the BLM that a river is navigable and therefore belongs to the State.

[3] Klondike Gold Rush National Historic Park and Sitka National Historic Park are not indicated at this scale.

[4] Alaska Maritime National Wildlife Refuge is not indicated at this scale.

No. 14-1209

IN THE

Supreme Court of the United States

JOHN STURGEON,
Petitioner,

v.

SUE MASICA, in Her Official Capacity as Alaska Regional Director of the National Park Service, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* STATE OF ALASKA IN SUPPORT OF PETITION OF CERTIORARI

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF *AMICUS CURIAE*	1
REASONS THE PETITION SHOULD BE GRANTED	2
I. Certiorari is Warranted Because the Ninth Circuit's Decision Contravenes ANILCA § 103's Assurances That Alaska Would Retain its Sovereign Right to Manage its Lands and Waters and Because it Imposes Exceptional Hardships on the People of Alaska	2
A. By Providing that Nonfederal Lands Inside Park Service Boundaries Will Not be Regulated as Federal Lands, ANILCA Protects the State's Sovereign Rights and Alaskans' Unique Needs	3
B. Rural Alaskans Depend on Alaska's Lands, Waters, and Resources for Many of Their Transportation, Economic, and Social Needs	5
C. Alaska's Sovereign Right to Regulate, Use, and Manage its Lands and Waters is Instrumental to Alaska's Statehood	7

TABLE OF CONTENTS—Continued

Page

II. The Ninth Circuit's Endorsement of the Park Service's Unlimited Regulatory Jurisdiction Over State Waters—and by Necessary Implication, State, Native, and Private Lands—Curtails Alaska's Political and Economic Sovereignty and Raises Significant Federalism Issues 12

III. The Need for Fidelity to ANILCA's Guarantees and Freedom from Regulatory Overreach is Particularly Compelling in Light of the Exceptional Nature of Rural Alaskans' Needs 18

CONCLUSION 23

APPENDIX

APPENDIX A: Alaska Department of Natural Resources Map of Alaska Conservation System Units 1a

TABLE OF AUTHORITIES

CASES	Page(s)
Addington v. Texas, 441 U.S. 418 (1979)	16
Alaska v. United States, 201 F.3d 1154 (9th Cir. 2000).	1
City of Angoon v. Marsh, 749 F.2d 1413 (9th Cir. 1984)	12, 14
City of Saint Paul, Alaska v. Evans, 344 F.3d 1029 (9th Cir. 2003)	10
Coyle v. Smith, 221 U.S. 559 (1911)	1
Gonzales v. Raich, 545 U.S. 1 (2005)	14
Gregory v. Ashcroft, 501 U.S. 452 (1991)	17
New York v. U.S., 505 U.S. 144 (1992)	20
Ninilchik Traditional Council v. Noah, 928 P.2d 1206 (Alaska 1996)	19
Saenz v. Roe, 526 U.S. 489 (1999)	14
State v. Lewis, 559 P.2d 630 (Alaska 1977)	9
Sturgeon v. Masica, No. 13-36166 (9th Cir. 2013)	17
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TABLE OF AUTHORITIES—Continued

Page(s)

Trustees for Alaska v. State, 736 P.2d 324 (Alaska 1987) 10

U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995) 14

CONSTITUTION

Ala. Const. art. VIII 9, 19

Ala. Const. art. VIII, § 1 9

Ala. Const. art. VIII, § 2 19

Ala. Const. art. VIII, § 14 9

STATUTES AND REGULATIONS

16 U.S.C. § 1 18

43 U.S.C. § 1311(a) 1, 12-13

54 U.S.C. § 100101 18

Alaska National Interest Lands Conservation Act, 16 U.S.C. § 3101, *et seq.* ..... *passim*

16 U.S.C. § 3101(d) 1, 12, 19

16 U.S.C. § 3102(1) 4, 11

16 U.S.C. § 3102(2) 11

16 U.S.C. § 3102(3) 11

16 U.S.C. § 3102(4) 3

16 U.S.C. § 3103 ..... *passim*

16 U.S.C. § 3103(c) 4, 10, 11, 14

16 U.S.C. § 3111-14 ..... 4, 12

16 U.S.C. § 3115-16 12

TABLE OF AUTHORITIES—Continued

Page(s)

16 U.S.C. § 3117-19 ..... 4, 12

16 U.S.C. § 3120-26 12

16 U.S.C. § 3161 19

16 U.S.C. § 3170 11

16 U.S.C. § 3170(a) 16

Alaska Native Claims Settlement Act, 43 U.S.C. § 1601 *et seq.* 10, 11, 20

Alaska Statehood Act, Pub. Law No. 85-508, 72 Stat. 339:

§ 6(a) (1958) 10

§ 6(b) (1958) 10

§ 6(i) (1958) 10

§ 6(m) (1958) 1

36 C.F.R. § ch. 1 18

36 C.F.R. § 1.2 16

36 C.F.R. § 1.2(a)(1) 13

36 C.F.R. § 1.2(a)(3) 13

36 C.F.R. § 1.2(b) 13

36 C.F.R. § 1.4(a) 20

36 C.F.R. § 2.17(a) 20, 21

36 C.F.R. § 4.10 20

36 C.F.R. § 5.3 21

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S. Rep. No. 96-413 (1979) 11

INTEREST OF *AMICUS CURIAE*

Alaska owns the riverbed of the Nation River as well as other lands and rivers falling within Alaska's National Park Service boundaries. *See* 43 U.S.C. § 1311(a); Alaska Statehood Act, Pub. Law No. 85-508, 72 Stat. 339, § 6(m) (1958); *Alaska v. United States*, 201 F.3d 1154, 1163-64 (9th Cir. 2000). Alaska's "ownership of [its] submerged lands, and the accompanying power to control navigation, fishing, and other public uses of water"—like its right to regulate its navigable waters—is an "essential attribute of sovereignty." *Tarrant Reg'l Water Dist. v. Herrmann*, 133 S. Ct. 2120, 2132 (2013) (internal quotation marks omitted); *Coyle v. Smith*, 221 U.S. 559, 573 (1911). Section 103 of the Alaska National Interest Lands Conservation Act (ANILCA) endorsed Alaska's sovereign right to manage its lands, waters, and resources by providing that state, Native, and private lands inside Alaska's park service boundaries would not be managed as if they were federally owned and by recognizing that this distinction was essential to providing "adequate opportunity for satisfaction of the economic and social needs of the State of Alaska and its people." 16 U.S.C. § 3101(d). Alaska has a direct and profound interest in maintaining its authority to keep its waterways open without federal regulatory interference, as Congress intended.[1]

The Ninth Circuit's decision in this case gives the National Park Service expanded regulatory control over state, Native, and privately owned lands and waters, contrary to Congress's intent. If left uncorrected,

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[1] Alaska provided counsel of record with timely notice of its intent to file this amicus brief in compliance with Supreme Court Rule 37.2(a).

the decision has broad ramifications that extend well beyond the damage to Alaska's sovereignty. The decision ignores the needs and realities of rural Alaskans, who face unparalleled access challenges and rely upon Alaska's unusual transportation thoroughfares to provide for their families. Alaska has a compelling interest in preserving its right to responsibly manage its lands and waters and in protecting Alaskans' rights to meaningfully and responsibly use state resources. The State also has an interest in preventing the decision's harmful economic consequences to the many Alaskans who depend on the state's waterways for their transportation, subsistence, and economic needs.

REASONS THE PETITION SHOULD BE GRANTED

I. Certiorari is Warranted Because the Ninth Circuit's Decision Contravenes ANILCA § 103's Assurances That Alaska Would Retain its Sovereign Right to Manage its Lands and Waters and Because it Imposes Exceptional Hardships on the People of Alaska.

This case considers the extent to which ANILCA—a federal statute of vital importance to Alaska, its residents, and its Native Corporations—permits the exercise of federal jurisdiction over nonfederal lands and waters in Alaska. The right to regulate and manage Alaska's abundant resources is an essential component of its sovereignty. The freedom to use and access those resources is also essential to many Alaskans' way of life. By granting the Park Service regulatory jurisdiction over state waters within the boundaries of Alaska's National Park Service lands, the Ninth Circuit's decision threatens that way of life.

If left to stand, the decision invites federal agencies to wield plenary regulatory control over all nonfederal waters and lands falling within any conservation system unit, in direct contravention of ANILCA. The decision raises significant federalism issues and has broad political, practical, and economic ramifications.

A. By Providing that Nonfederal Lands Inside Park Service Boundaries Will Not be Regulated as Federal Lands, ANILCA Protects the State's Sovereign Rights and Alaskans' Unique Needs.

Alaska occupies an area equivalent to one-fifth of the continental United States's landmass. Over 60% of all land in Alaska is owned by the federal government. As the largest landowner in the State, the federal government already manages an area more than four times the size of Wyoming. By contrast, the federal government owns a mere 4% of lands in the continental non-western states. The federal government's colossal and disproportionate land ownership in Alaska makes the State's freedom to manage its own lands, waters, and resources crucial to Alaska's political independence and economic health.

ANILCA grew the National Park Service in Alaska and reserved over 100 million acres of federal land in the state—an area larger than California—for conservation and protection. 16 U.S.C. § 3101 *et seq.* Vast swaths of Alaska's new and expanded national parks, wildlife refuges, wild and scenic rivers, national trails, wilderness preservation systems, and national forest monuments were organized into conservation system units managed by different federal land management agencies. *Id.* § 3102(4). Roughly 40% of

Alaska now falls within an ANILCA conservation system unit. Alaska's National Parks now make up two-thirds of the entire National Park System.[2]

While ANILCA reserved massive amounts of land by placing it in a conservation status—significantly limiting the possibility for Alaska's future economic development—Congress also included certain provisions intended to safeguard Alaska's authority over nonfederal lands. *See id.* §§ 3103, 3111-14, 3117-19. Congress protected Alaska's ability to direct the use of its own lands and waters by expressly stating that nonfederal "lands"—defined to include state waters as well as lands—falling within the newly expanded park boundaries would not be treated as if they were federally owned and thus not be subject to the legion of federal regulations applied throughout the National Park System. *Id.* §§ 3102(1), 3103(c). The Ninth Circuit failed to realize that guarantee, giving the Park Service—and potentially other federal land management agencies—broad authority to regulate state lands and waters as if they were part of federal conservation system units. This decision overhauls ANILCA, to Alaska's detriment.

ANILCA's limitation on the scope of the federal government's regulatory control in Alaska presents an issue of exceptional importance to the State and its people, and this petition presents an appropriate and timely vehicle for the Court to address it. Because Alaska is the only state entitled to the benefits of

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[2] In addition, approximately 86% of the total land area administered by the United States Fish and Wildlife Service and nearly one-third of the land area administered by the Bureau of Land Management is in Alaska. The appendix attached to the State's brief shows the extent of Alaska conservation system units.

ANILCA's § 103 guarantees and the only state whose sovereignty is imperiled by § 103's destruction, no circuit split on this issue will ever be possible. Review on certiorari provides the only opportunity for Alaskans to retain their rights to their lands, waters, and resources within the federal enclaves ANILCA created. And only if certiorari is granted will Alaska's sovereignty over its own land be meaningfully assured. Without prompt review, the Ninth Circuit's decision endorses further federalization of state resource management decisions and subjects Alaskans to federal regulatory control in a manner that Congress neither authorized nor intended.

B. Rural Alaskans Depend on Alaska's Lands, Waters, and Resources for Their Transportation, Economic, and Social Needs.

Alaska is home to bountiful natural resources, including over 12,000 rivers and three million lakes—the largest network of navigable waters anywhere in the country. The state also is home to abundant fish and wildlife, significant reserves of oil and natural gas, and economically viable subsurface mineral deposits. Alaska's vast terrain and rich resources are the heart of the state's cultural identity and the fountainhead of its political sovereignty. They capture the national imagination and have fortified the state's economy. But Alaska's massive size, widely dispersed population, lack of developed infrastructure, variable topography, and climactic extremes also make it the most remote state in America. Over three-quarters of Alaska's roughly 300 communities are unconnected by road. While many Alaskans live in urban or semi-urban areas, roughly twenty percent of the state's

736,732 residents live in regions unconnected to the road system. Half of these residents live in the state's most remote villages. These communities confront disproportionately higher levels of poverty and have limited infrastructure, some lacking essential services like water and sanitation. Residents in these areas are acutely reliant on Alaska's rich resources.

The primary means of transportation for rural Alaskans are all-terrain vehicles; airplanes—generally regional, small bush plane, or private air service; snowmachines; and boats. Alaska's mountainous northern climate further shapes the unusual nature of the state's limited transportation options: severe storm patterns routinely disrupt air service and rivers seasonally evolve into ice roads. The state's sharply varied topography, limited service hubs, extreme seasonal variations, and high costs of construction challenge the state's ability to develop its transportation and resource infrastructure.

Alaska's waters provide essential travel corridors. Many rural Alaskans, particularly those in southwest Alaska, live in small villages stretched along rivers and depend on these networks of water connections for their everyday needs. Major rivers like the Yukon and Kuskokwim serve as critical arteries for transporting fuel and goods to much of western Alaska throughout the summer months. Rural Alaskans rely on these water links to access goods and services, recreate, and travel to hunting and fishing grounds. Even in winter, when temperatures drop and rivers evolve into frozen highways for snowmachine, dogsled, and all-terrain vehicle traffic, Alaska's waters continue to form a vital part of the state's transportation infrastructure.

Residents in Alaska's rural communities also face economic challenges. They confront a formidable combination of high costs of living, little if any local tax base, fewer job opportunities, and limited earnings. In Alaska's remote villages, localized resource-based activities—including local tourism and recreation related jobs or small-scale mining, sport fishing, wildlife guiding, or trapping—often provide an essential part of families' incomes and contribute to the economic activity of the region. Alaska Natives in particular, who comprise nearly 80% of the population in Alaska's remote communities, rely on the State's waters and lands for their subsistence fishing and hunting needs.

What is at stake here for Alaska, therefore, is not just a differing view from the National Park Service about permissible weekend recreation or the best method of routing tourists through national parks. Because unencumbered access to Alaska's waters and meaningful use of Alaska's natural resources is necessary to sustain life in much of rural Alaska, the State's continued management of its waters and lands is essential.

C. Alaska's Sovereign Right to Regulate, Use, and Manage its Lands and Waters is Instrumental to Alaska's Statehood.

Perhaps more than in any other state, management and control of Alaska's natural resources lies at the heart of the State's federalist interests. A central motivation for Alaskans seeking statehood in 1956 was to allow the resource-rich territory to manage its own lands and waters. When the delegates gathered in 1955 to draft the Alaska Constitution, the territory

was blessed with a wealth of natural resources, and the delegates expected an enormous grant of land and minerals from Congress at statehood that would sustain the new State. But the territory's history was one of resource exploitation by outside interests.

Before statehood, Alaska had benefitted little from the extraction of its minerals or from the fur trade and fishing industries. Congress, not Alaska's territorial government, owned nearly all the land and had most of the authority over land laws, natural resources management, and fiscal matters. Terrence M. Cole, Institute of Social and Economic Research, Univ. of Alaska Anchorage, *Blinded by Riches: The Permanent Funding Problem and the Prudhoe Bay Effect* 30-33 (2004).[3] Mining taxes were low and thus contributed little, and "only a tiny fraction of the wealth from the salmon industry ever directly touched Alaska's shores." *Id.* at 36, 51-52. Alaska was seen as a "feudal barony" where "[a]bsentee corporations took away millions in fish, gold, and furs and left behind nothing in the form of social or economic benefits." Richard L. Neuberger, *Gruening of Alaska*, 36 Survey Graphic 512 (1947).[4] Alaska's financial problems caused statehood opponents to claim that Alaska could not afford the costs of statehood and was too dependent on the federal government. Cole, *supra*, at 63-65, 69-70. Proponents of statehood, however, argued that it would provide Alaskans enough land and political autonomy to regulate the development of their natural

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[3] *Available at* http://www.iser.uaa.alaska.edu/Publications/blindedbyriches.pdf.

[4] *Available at* http://www.archive.org/stream/surveygraphic36survrich#page512/mode/2up.

resources in the manner most beneficial in the long run to Alaskans. *Id.* at 70-72.

The delegates to Alaska's constitutional convention "were uniform in their belief that Alaska's natural resources had been 'locked up' and devalued by the negligent actions of the federal government and absentee owners," and that the careful development of Alaska's resources "spelled the difference between a future of plenty or of poverty" for the new state. Gerald A. McBeath, The Alaska State Constitution 159 (2011). Article VIII to the constitution they drafted recognized the critical importance to the State of thoughtful, internal management of Alaska's resources, commanding that they be reserved to the people "for maximum use consistent with the public interest" and providing for free access to Alaska's navigable or public waters. Alaska Const. art. VIII, §§ 1, 14.

Members of the convention's resources committee also acknowledged the difficulty of reconciling the desire to develop Alaska's resources with the need to avoid the resource exploitation of the past. Victor Fischer, Institute of Soc., Econ. and Gov't Research, Univ. of Alaska, Alaska's Constitutional Convention 132-33 (1975). The delegates ultimately drafted an entire article to direct the state to carry out prudent resource development that would most benefit all Alaskans. Alaska's new constitution served as the basis for subsequent statehood petitions to Congress. *State v. Lewis*, 559 P.2d 630, 636 (Alaska 1977).

Congress, concerned that Alaska would not be able to raise sufficient revenue to carry out the responsibilities of statehood, gave it the resources to fund self-governance in the form of 103 million acres

of land and mineral rights. Alaska Statehood Act, Pub. Law No. 85-508, 72 Stat. 339, §§ 6 (a), (b), (i) (1958); Cole, *supra*, at 77-78. "The primary purpose of the statehood land grants . . . was to ensure the economic and social well-being of the new state." *Trustees for Alaska v. State*, 736 P.2d 324, 335 (Alaska 1987). The grants were to be "an endowment which would yield the income that Alaska needed to meet the costs of statehood." *Id.* at 336. Through these land grants, Congress recognized that Alaska stood ready, willing, and able to manage its resources. It relinquished federal control to the people who best understood the State's needs and were most prepared to govern its abundant natural bounty—Alaskans.

The next major piece of federal legislation to address Alaska's lands was 1971's Alaska Native Claims Settlement Act (ANCSA). 43 U.S.C. § 1601 *et seq.* ANCSA implemented "a fair and just settlement" of aboriginal Native Alaskan land claims by creating twelve regional corporations and more than 200 village corporations owned by Alaska Natives and conveying to these new entities approximately 44 million acres of federal land in Alaska, together with its subsurface estate. The lands were intended largely for development to sustain and support Alaska's Native peoples. *See* 43 U.S.C. § 1601 *et seq.*; *City of Saint Paul, Alaska v. Evans*, 344 F.3d 1029, 1031 (9th Cir. 2003).

Twenty-one years after statehood, Congress passed ANILCA. While ANILCA's primary purpose was to create federal conservation areas, Congress also reinforced its commitment to preserving Alaska's right to manage its own resources. Section 103(c) assures Alaska's sovereign authority to do so by providing

that only federal lands and waters falling within conservation system unit boundaries are considered a part of the unit, thus excluding state and ANCSA Native Corporation lands. 16 U.S.C. § 3103(c); *see also id.* § 3102(1)-(3), (11). The Senate Report regarding the statutory predecessor to § 103 explained that "[t]hose private lands, and those public lands owned by the State of Alaska . . . are not to be construed as subject to the management regulations which may be adopted to manage and administer any national conservation system unit which is adjacent to, or surrounds, the private or non-Federal public lands." S. Rep. No. 96-413, at 303 (1979). By contrast, the Senate explained that state, Native, or private lands and waters would not be exempt from federal laws and regulations applicable to private and public lands nationwide—like the Clean Air Act—commenting that such universally applicable laws would be "unaffected by the passage of this bill." *Id.* Section 103 then quarantines federal jurisdiction by removing those nonfederal lands and waters from the reach of the extensive regulatory regime applicable to federally owned parklands nationwide. 16 U.S.C. § 3103(c) (providing that nonfederal lands are not "subject to the regulations applicable solely to [federal lands] within such units"). The language of § 103(c) thus provides a check on the risk of abuse of federal regulatory power.

ANILCA also acknowledged, to a limited extent, that Alaskans confront unusual challenges. In particular, it did so by providing select access protections and authorizing the use of snowmachines, motorboats, and airplanes on federal conservation system unit lands in Alaska for traditional activities and travel to and from villages and homesites. 16 U.S.C. § 3170. Congress further recognized that Alaskans had unique economic and subsistence needs and that the states's

resources were the foundation of its economy. *Id.* §§ 3101(d), 3111-26. Congress's statement of purpose acknowledged that ANILCA protected the national interest in scenic, natural, cultural, and environmental values on public lands in Alaska but also "provided adequate opportunity for satisfaction of the economic and social needs of the State of Alaska and its people." *Id.* § 3101(d); *see also City of Angoon v. Marsh*, 749 F.2d 1413, 1415-16 (9th Cir. 1984). In this way, ANILCA preserves a healthy balance of power and prevents federal usurpation of state land management decisions. That balance, and Alaska's longstanding sovereign right to manage its lands and resources, now lies in peril.

II. The Ninth Circuit's Endorsement of the Park Service's Unlimited Regulatory Jurisdiction Over State Waters—and by Necessary Implication, State, Native, and Private Lands—Curtails Alaska's Political and Economic Sovereignty and Raises Significant Federalism Issues.

The Ninth Circuit's decision in this case turns a blind eye to these historical and practical realities. It diminishes Alaska's sovereignty and thwarts its ability to address the needs of its citizens. This Court should grant certiorari and carry out Congress's intent to protect Alaska's authority over its own lands and waters.

On a superficial level, the Ninth Circuit's decision held that the National Park Service had regulatory jurisdiction to impose and enforce a type of access ban on the Nation River, a navigable tributary of Alaska's Yukon River. [Pet. App. B at 25a-28a; *see also*

43 U.S.C. § 1311(a)] It ostensibly tethered that determination, at least in part, to the 1976 Park Service Administration Improvement Act, which authorizes the Park Service to regulate "boating and other activities on or relating to waters located within areas of the National Park System, including waters subject to the jurisdiction of the United States." [Pet. App. B at 25a] But the Ninth Circuit went further, wielding ANILCA to sanitize the Park Service's amplification of its jurisdiction over Alaska's waters—and, by necessary implication, state, Native, and private lands. [Pet. App. B at 25a-26a]

The Ninth Circuit contorted the text of § 103 into an independent grant, rather than a restriction, of regulatory authority. It reasoned that because the hovercraft ban applies to all National Park Service lands and waters nationwide—even "navigable waters and areas within their ordinary reach . . . without regard to the ownership of submerged lands, tidelands, or lowlands"—the ban did not apply "solely" to Park Service lands in Alaska and thus did not violate ANILCA. [Pet. App. B at 25a-26a (citing 36 C.F.R. § 1.2(a)(1), (3))] In essence, the Ninth Circuit endorsed the Park Service's self-granted authority to regulate nonfederal lands in Alaska so long as the regulation it crafted was "specifically written to be applicable on such lands." 36 C.F.R. § 1.2(b). It approved a federal agency's jurisdictional leap because the agency's own regulation provided the springboard. As a result, although the Ninth Circuit purported to "limit [its] consideration to the regulation as applied to Sturgeon," its holding—that any Park Service regulation of general applicability may be enforced on nonfederal lands within Alaskan conservation system units—operates far beyond the facts of Sturgeon's

challenge. [Pet. App. B at 21a n.5, 26a] This decision triggers serious federalism concerns.

Federalism is the "genius . . . that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other." *Saenz v. Roe*, 526 U.S. 489, 504 n.17 (1999) (quoting *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring)). Federalism serves to "protect historic spheres of state sovereignty from excessive federal encroachment and thereby to maintain the distribution of power fundamental to our federalist system of government." *Gonzales v. Raich*, 545 U.S. 1, 42 (2005) (O'Connor, J., dissenting).

The Ninth Circuit's reasoning scorns Alaska's constitutional and statutory right to control its resources by ignoring the textual boundaries within § 103(c) that rightfully cabin the Park Service's jurisdiction. The Ninth Circuit apparently believes that the Park Service can assert control over state, Native, or private inholdings in Alaska simply by promulgating a nationwide regulation. This decision not only fails to honor ANILCA's framework, but it also violates § 103's intent, perversely transforming a provision designed to respect and promote Alaska's sovereignty into a tool for undermining it. The decision also contradicts the Ninth Circuit's previously expressed understanding that ANILCA's drafters "never intended the mere location of boundary lines on maps delineating the overall conservation system to indicate that private lands . . . were to be treated as public lands." *City of Angoon v. Marsh*, 749 F.2d 1413, 1417 (9th Cir. 1984). The combination of these errors led to an endorsement of federal regulatory control based on an executive agency's burgeoning jurisdictional interest, not an act of Congress.

It would make little sense for Congress to explicitly state that nonfederal lands are not to be considered a part of a conservation system unit under § 103 and simultaneously cede authority to subject those lands to federal regulation anytime a federal agency deemed it appropriate. But under the court's rationale, anytime the Park Service—and potentially any other federal land management agency—wants to impose restrictions on nonfederal lands falling within Alaska conservation system unit boundaries, it need only adopt a nationwide regulation. Section 103's limitations are now toothless; Congressional intent is subordinated to the Park Service's evolving regulatory whims.

The fallout from the court's decision will be immediately felt in Alaska. Because over 60% of all National Park Service-administered lands are in Alaska, the State will be disproportionately affected by any regulation of professed "general applicability." At the same time, however, by exempting state, Native, or private lands from Alaska-specific Park Service regulations, the Ninth Circuit has incentivized the Park Service to nationalize its land management strategy. After all, regulating with broad strokes is now the means by which the Park Service can exert federal control over nonfederal lands in Alaska. But the Park Service cannot sensibly manage the entire nation with one set of regulations: just as imposing a nationwide prohibition on all-terrain vehicle use in Alaska would unacceptably alter how many Alaskans travel to meet their everyday needs, for example, a national regulation allowing unrestricted all-terrain vehicle use in Yellowstone, Yosemite, or the Grand Canyon might be equally harmful to those areas and disrupt their peaceful wilderness character. Yet this is exactly

the type of one-size-fits-all regulation that the Ninth Circuit's decision encourages.

Accepting the court's view that the Park Service has unbridled authority to regulate private land within conservation system unit boundaries also leads to potentially absurd results. ANILCA places some limits on the Park Service's ability to limit Alaskans' transportation across federal conservation system units. On those federal lands, the Park Service cannot prohibit travel by plane or snowmachine "for traditional activities" or "travel to and from villages and homesites" without making findings that the access is damaging to the unit and providing notice and a hearing. 16 U.S.C. § 3170(a). But the Park Service now claims the authority to go much further: under the Ninth Circuit's view of 36 C.F.R. § 1.2, the Park Service could ban such travel on private, Native, and state lands within conservation system units through a self-granted regulatory authority—and without making those findings. Congress intended § 103 to preserve, not diminish, state and Native land ownership rights. Interpreting the statute to potentially allow the Park Service to provide less access, and less process, on nonfederal lands than on federal ones contravenes the provision's intent and further diminishes Alaska's sovereign rights to its land.

"The essence of federalism is that states must be free to develop a variety of solutions to problems and not be forced into a common, uniform mold." *Addington v. Texas*, 441 U.S. 418, 431 (1979). But the Ninth Circuit decision here does precisely that. By wresting control away from the State in favor of federal management, the court's decision undercuts Alaska's sovereign authority to manage its own lands and waters consistent with state and local conditions,

practicalities, and priorities. *See Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) (recognizing that the federalist structure of joint sovereigns "assures a decentralized government will be more sensitive to the diverse needs of a heterogeneous society"). The Ninth Circuit approved of a regime in which Alaska may not access its own land and resources to implement state policy choices about how to best provide for Alaskans unless it first obtains permission from federal agency bureaucrats.

This case provides a salient example: recognizing the particular social needs and transportation challenges in its rural areas, Alaska permits hovercraft use on state waters. The National Park Service, guided by nationwide rather than local concerns, made a different choice. The Ninth Circuit's decision overrides Alaska's decision-making and forces Alaska into the same common mold as the other forty-nine states, notwithstanding its exceptional geography and challenges.

The facts of No. 13-36166, Alaska's companion case decided together with Sturgeon's in a consolidated opinion, similarly reflect how the Ninth Circuit's interpretation of § 103 operates in practice to undermine Alaska's sovereignty. Park Service regulations required Alaska state officials to obtain federal permission, in the form of a permit, to access state-owned land and conduct scientific research on salmon. By requiring the State to ask for advance permission before accessing its own lands to conduct beneficial scientific research, the federal government unduly interferes with Alaska's ability to make use of its resources. Although Alaska's case is not an ideal vehicle for this Court's review because it presents a threshold standing issue, its facts nevertheless illustrate how

nationwide Park Service regulations infringe on Alaska's sovereignty.

The Park Service has also required Alaska to ask permission from the federal government to conduct research on caribou migrations on state land, and then to provide the resulting data to the Park Service. The Park Service mandates that Alaska sacrifice its sovereign dignity and beg, hat in hand, to conduct scientific research on state land. The principles of federalism on which our nation is based—and upon which Alaska was granted its resource-rich lands at statehood—should bar these results. This Court should grant the petition to ensure that federal overreach does not swallow Alaska's right to self-determination.

III. The Need for Fidelity to ANILCA's Guarantees and Freedom from Regulatory Overreach is Particularly Compelling in Light of the Exceptional Nature of Rural Alaskans' Needs.

The damage to Alaska's federalism is not theoretical; there are real-world harms here. The court's unchecked deference to a federal agency's desire to define its own authority—in violation of a Congressional provision meant to curtail it—jeopardizes the transportation, social, and economic interests of Alaska's rural residents. This failure has far-reaching consequences that extend beyond this case.

National parklands across the country are broadly regulated by the federal government for conservation and environmental purposes. *See generally* 54 U.S.C. § 100101 (formerly 16 U.S.C. § 1); 36 C.F.R. §§ chap. 1. Alaska shares a longstanding commitment to protecting the value of its bountiful resources: the Alaska

Constitution explicitly provides for the conservation of the state's natural resources for the maximum benefit of its people. Alaska Const. art. VIII, § 2.[5] But unlike the Park Service, Alaska's obligations and its public trust responsibilities are necessarily balanced with the responsibility to grow its economy, satisfy evolving infrastructure demands, and provide for Alaskans.

Congress was cognizant of the state's need to balance those goals when it passed ANILCA. In acknowledging the integral role Alaska's resources play in driving the state's economy, Congress—like the framers of Alaska's constitution—endeavored to strike a balance between the economic and environmental interests in Alaska's resources. *See* 16 U.S.C. § 3101(d). Congress also recognized Alaska's infrastructure and service delivery challenges. ANILCA observes that Alaska's transportation and utility network is "largely undeveloped" and provides a single statutory authority for applications for transportation and utility systems through public lands. The statute implicitly recognizes that given the breadth of public lands across the state, Alaska requires access to those areas to grow its infrastructure. *See id.* § 3161. But the end result of the Ninth Circuit's decision is to ignore ANILCA's protections and shoehorn all states into a monolithic scheme of nationwide regulation.

Erosion of Alaska's sovereign right to manage its waters is an initial but impactful step toward unwarranted comprehensive federal land management

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[5] The Alaska Constitution expresses a policy of promoting responsible resource development. *See Ninilchik Traditional Council v. Noah*, 928 P.2d 1206, 1212 n.11 (Alaska 1996) (discussing Article VIII of the Alaska Constitution).

regulation in Alaska. The Park Service impeded Mr. Sturgeon's right to freely access a state-owned navigable river, a right that he, like other Alaskans, historically exercised without federal interference. Yet the impact of the case goes well beyond one man. Alaska's Native Corporations, whose rights to develop their lands as contemplated under ANCSA are now in jeopardy, may feel the impact of the court's decision most immediately. But by shifting decision-making for state resource management to the federal government, the decision also imperils the everyday liberties of ordinary Alaskans. *See New York v. U.S.*, 505 U.S. 144, 181 (1992) ("[T]he Constitution divides authority between federal and state governments for the protection of individuals. State sovereignty is not just an end in itself: Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power." (internal quotation marks omitted)).

Because Alaskans routinely use the state's waters and lands in ways that are crucial yet uncommon in the rest of the country, the potential harm created by the Ninth Circuit's holdings is vastly magnified. Access bans or restrictions on the use of all-terrain vehicles, for example, may be prompted by reasonable agency concern for noise disruption or the safety of park visitors on busy mixed-use trials in the lower 48 states; but in Alaska, where ATVs are a common daily mode of transportation on summer trails and on Alaska's frozen winter ice highways, those same restrictions would threaten not thrill-seeking weekend tourists, but everyday travelers. *See* 36 C.F.R. §§ 1.4(a), 4.10. A ban on the use of helicopters might seem like a reasonable and even desirable limitation to preserve the wilderness character of most national parks and refuges; but applied in Alaska it would prohibit state officials from reaching remote

state, Native, or privately owned lands to conduct scientific studies on water quality. *See id.* § 2.17(a). Commercial activity regulations, already widely applied throughout the park system, might make sense in most parks; but in Alaska, applying the same commercial access or use restrictions on major state navigable waters like the Yukon or Kuskokwim rivers would cripple local industries like commercial fishing, hunting, or tourism in and around Native villages. *See id.* § 5.3.

In short, because of Alaska's differences, unthinking application of a nationwide regulatory scheme would harm rural Alaska. It would interfere with the ability of residents to meaningfully and responsibly harness state resources to supplement family income. It would impede the State's sovereign ability to carry out scientific research. And it would impede summer barge and winter ice road traffic along Alaska's waterways, threatening the flow of goods and services to remote communities stretched along the state's rivers, further exacerbating the high cost of living in bush Alaska. Even if enforcement of such regulations is not a Park Service priority, ordinary Alaskans should not need to fear criminal prosecution, civil fines, or other sanctions—as did Mr. Sturgeon—for simply going about their daily lives.

The court's decision to subject state, Native, and private lands and resources to the self-imposed regulatory jurisdiction of federal agencies—whose missions differ from and do not account for the Alaskan experience—could also impede Alaska's wider efforts to meet the needs of its residents. Dwindling state revenues have already hampered Alaska's ability to grow the state's infrastructure. For example, the Ambler Road, a high-profile state project intended to facilitate

Alaska's ability to responsibly develop its resources, is now on hold in light of a state budget shortfall. Yet projects like the road often provide important job opportunities, vital means of access, and facilitate the flow of more affordable goods and services to remote communities. And given Alaska's many logistical challenges, access to and use of state resources like gravel bars and minerals on the state's submerged lands and in the beds of Alaska's navigable rivers offers an affordable, often essential, building block for these projects. Alaska's right to responsibly harness its resources remains as crucial now as at statehood and only if the State retains that right can it meaningfully sustain its sovereignty.

* * *

Section 103 of ANILCA pledges that Alaska will retain its sovereign right to manage and regulate its lands and resources to help meet the unique needs of its people. The Ninth Circuit's decision revokes that pledge, leaving Alaska subject to increasing federal regulation in a manner that Congress neither intended nor authorized. This Court should grant the petition to protect the many Alaskans who rely on the state's resources for their daily needs, to preserve Alaska's sovereignty, and to reinstate ANILCA's carefully negotiated balance between state and federal regulatory control.

CONCLUSION

This Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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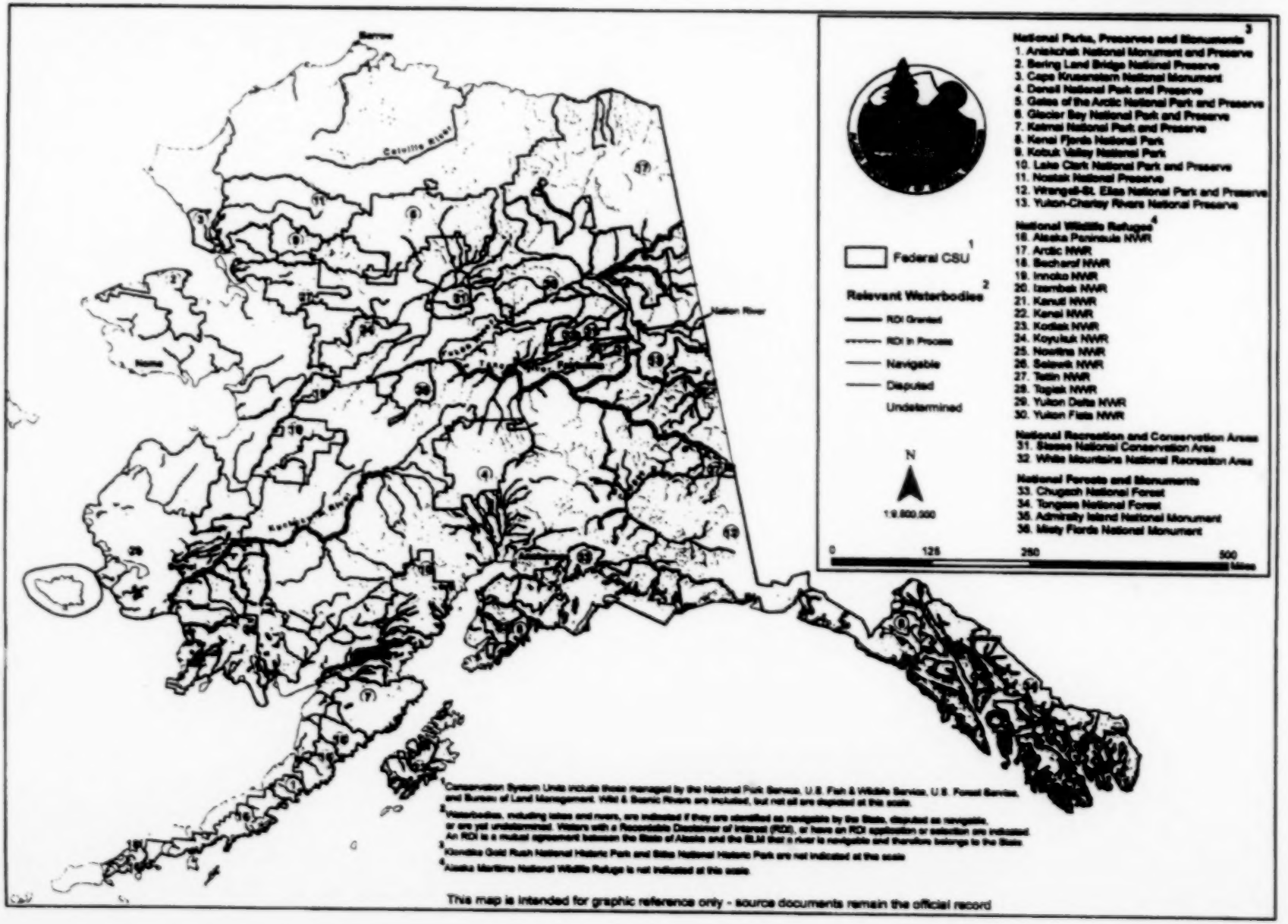
APPENDIX



[1] Conservation System Units include those managed by the National Park Service, U.S. Fish & Wildlife Service, U.S. Forest Service, and Bureau of Land Management. Wild & Scenic Rivers are included, but not all are depicted at this scale.

[2] Waterbodies, including lakes and rivers, are indicated if they are identified as navigable by the State, disputed as navigable, or are yet undetermined. Waters with a Recordable Disclaimer of Interest (RDI), or have an RDI application or selection are indicated. An RDI is a mutual agreement between the State of Alaska and the BLM that a river is navigable and therefore belongs to the State.

[3] Klondike Gold Rush National Historic Park and Sitka National Historic Park are not indicated at this scale.

[4] Alaska Maritime National Wildlife Refuge is not indicated at this scale.

This map is intended for graphic reference only - source documents remain the official record

No. 14-1209

In the Supreme Court of the United States

JOHN STURGEON,

Petitioner,

v.

BERT FROST, in His Official Capacity as Alaska Regional Director of the National Park Service, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF ALASKA MINERS ASSOCIATION, INC., ALASKA OIL AND GAS ASSOCIATION, ALASKA CHAMBER, ALASKA FOREST ASSOCIATION, ALASKA CONSERVATION TRUST, ALASKA SUPPORT INDUSTRY ALLIANCE, ASSOCIATED GENERAL CONTRACTORS OF ALASKA, COUNCIL OF ALASKA PRODUCERS, AND RESOURCE DEVELOPMENT COUNCIL FOR ALASKA, INC. AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTERESTS OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 5

ARGUMENT 6

I. The Primary Purpose of ANILCA is to Complete the Promises Made by the Statehood Act and ANCSA 6

II. The Ninth Circuit's Interpretation of Section 103(c) Conflicts with the Plain Language and Primary Purpose of ANILCA 12

A. The plain language of Section 103(c) precludes the application of all National Park Service regulations to inholdings in Alaska 12

B. The Ninth Circuit's interpretation of Section 103(c) undermines the purpose of ANILCA 15

C. The National Park Service reads the purpose of ANILCA too narrowly 21

CONCLUSION 24

TABLE OF AUTHORITIES

Cases

Almendarez-Torres v. United States,
523 U.S. 224 (1998) . 6

Amoco Production Co. v. Village of Gambell, Alaska,
480 U.S. 531 (1987) *passim*

Circuit City Stores, Inc. v. Adams,
532 U.S. 105 (2001) 6

Hale v. Norton,
476 F.3d 694 (9th Cir. 2007) 12

Koniag, Inc. v. Koncor Forest Res.,
39 F.3d 991 (9th Cir. 1994) 17, 21

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768 F.3d 1066 (9th Cir. 2014) *passim*

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396 F.2d 746 (9th Cir. 1968) 7

United States v. Alaska,
521 U.S. 1 (1997) 23

W. Air Lines, Inc. v. Bd. of Equalization of S.D.,
480 U.S. 123 (1987) 15

Rules

Supreme Court Rule 37(6) 1

Statutes

16 U.S.C. § 410hh-2 14

16 U.S.C. § 410hh-3 17

16 U.S.C. § 3101(d) 10, 22
16 U.S.C. § 3102(4) 10
16 U.S.C. § 3103(c) 4, 11, 12, 13
16 U.S.C. § 3170(b) 12
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McDowell Group, The Economic Impacts of Placer Mining in Alaska (Oct 2014), http://alaskaminers.org/placer-mining/ 23

INTERESTS OF *AMICI CURIAE*

Alaska Miners Association, Inc., Alaska Oil and Gas Association, Alaska Chamber, Alaska Forest Association, Alaska Conservation Trust, Alaska Support Industry Alliance, Associated General Contractors of Alaska, Council of Alaska Producers, and Resource Development Council for Alaska, Inc. hereby submit this *amici curiae* brief in support of the Petitioner John Sturgeon.[1]

More than any other state, Alaska's economy is dependent on the use and development of the state's natural resources. Fisheries, mining, oil and gas production, forestry, and tourism are the backbone of Alaska's economy. *Amici curiae* represent the industries that drive Alaska's economy through the development and use of Alaska's natural resources.

Alaska Miners Association, Inc. is a nonprofit corporation representing the mining industry in Alaska. It advocates for the development and use of Alaska's mineral resources to provide an economic base for the state. Mining provides jobs for thousands of Alaskans and millions of dollars of personal income throughout Alaska. Alaska's mining industry includes exploration, mine development, and mineral production. Alaska's mines produce gold, zinc, lead,

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[1] Pursuant to Supreme Court Rule 37(6), undersigned counsel certifies that (A) no party's counsel authored this brief, in whole or in part; (B) no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and (C) no person, other than the *amici curiae* or their members, contributed money that was intended to fund preparing or submitting this brief. The parties have consented to this motion.

silver, and coal, as well as construction materials, such as sand, gravel, and rock.

The Alaska Oil and Gas Association is a professional trade association whose mission is to foster the long-term viability of the oil and gas industry for the benefits of all Alaskans. It represents the majority of companies that are exploring, developing, producing, refining, or marketing oil and gas on the North Slope, in the Cook Inlet, and in the offshore areas of Alaska. On an annual average, the oil and gas industry in Alaska provides an average of 110,000 jobs and about $6 billion in total wages.

The Alaska Chamber is a nonprofit corporation dedicated to improving the business environment in Alaska. The Alaska Chamber represents hundreds of businesses from Ketchikan to Barrow that share a common goal: to make Alaska a viable and competitive place to do business. The Alaska Chamber was founded in 1952 prior to statehood, and has helped shape the policies impacting the development of the state's natural resources.

Alaska Forest Association is an industry trade association representing the timber industry of Alaska. Alaska Forest Association is dedicated to advancing the restoration, promotion and maintenance of a healthy, viable forest products industry, and contributing to economic and ecological health in Alaska's forests and communities. Alaska's forest products industry provides hundreds of jobs and contributes millions of dollars to Alaska's economy.

The Alaska Conservation Trust is a non-profit corporation working to ensure equal protection for

Alaska's people, businesses, and the environment. The Alaska Conservation Trust serves as a watchdog for Alaska's economy and environment, and works to foster strategic alliances to support the economic health of Alaska communities.

Alaska Support Industry Alliance is a nonprofit corporation that represents more than 500 members providing more than 50,000 Alaskan jobs related to the oil, gas, and mining industries. The Alaska Support Industry Alliance's mission is to advocate for safe, environmentally responsible development of Alaska's oil, gas, and mineral resources for the benefit of all Alaskans.

Associated General Contractors of Alaska is a nonprofit corporation representing the interests of the construction industry. Its members build the roads, bridges, pipelines, facilities, buildings, and other infrastructure that allow Alaska's businesses to use and develop Alaska's natural resources.

Council of Alaska Producers is a nonprofit corporation representing Alaska's large metal mining industry. Its members operate large-scale mining operations for gold, silver, zinc and lead. Mining is a growth industry in Alaska, with several promising projects in development, in addition to strong operating mines across the state that provide jobs that support Alaskan families.

Resource Development Council for Alaska, Inc. is a nonprofit corporation, comprised of individuals and companies involved in Alaska's oil and gas, mining, timber, tourism, and fisheries industries. Its membership includes Alaska Native Corporations, local

communities, organized labor, individuals, and industry support firms. The Resource Development Council's purpose is to encourage a strong, diversified private sector in Alaska and to expand the state's economic base through the responsible development of Alaska's natural resources.

The success of the businesses represented by these organizations in building Alaska's economy, and their ability to continue to do so in the future, is dependent on a series of promises made by Congress that provide access to these resources. These promises started with the Alaska Statehood Act of 1958 (the "Statehood Act"), continued with the Alaska Native Claims Settlement Act in 1971 ("ANCSA"), and culminated with the Alaska National Interest Lands Conservation Act in 1980 ("ANILCA"). These acts collectively allow the State of Alaska and Native Corporations to identify, select, and receive lands that provide the resources necessary to build the state's economy and serve the interests of Alaska's people. More than just confirming ownership, ANILCA Section 1110 ensures that the state, Native Corporations, and other private owners will have adequate and feasible access to their lands across federal lands. And ANILCA Section 103(c) ensures that any state, Native Corporation, or other private lands, including selected lands within reserved federal "conservation system units" (or "CSUs"), will not be treated as part of those units and will not "be subject to the regulations applicable solely to public lands within such units." 16 U.S.C. § 3103(c).

In the decision below, *Sturgeon v. Masica*, 768 F.3d 1066 (9th Cir. 2014), the Ninth Circuit undermines one of ANILCA's core protections. According to the Ninth

Circuit, the protection in Section 103(c) prohibits only those regulations that apply solely "in Alaska," such as Alaska specific National Park Regulations. Under *Sturgeon*, Section 103(c) does not prohibit the National Park Service from enforcing generally applicable regulations that apply to all National Parks to inholdings in Alaska. As a result, Alaska-specific regulations (like park-specific camping and hunting regulations) do not apply to inholdings in Alaska, but general Park regulations (such as those related to mining or oil and gas development that could prohibit economic development of the land) would apply to inholdings is Alaska. This renders the protection of Section 103(c) meaningless.

The Ninth Circuit's decision is contrary to the plain language of ANILCA, ignores the context under which Section 103(c) was enacted, undermines the Congressional promises of ANILCA, and will have wide ranging consequences for business interests that depend on the development and use of inholdings in Alaska. The Court should reverse.

SUMMARY OF ARGUMENT

Amici curiae endorse and support the arguments of the Petitioner demonstrating that the Ninth Circuit in *Sturgeon* erred in concluding that National Park Service regulations of "general applicability may be enforced on both public and nonpublic lands alike within CSUs" in Alaska. 768 F.3d at 1078. This holding is contrary to the plain language of Section 103(c), which makes no distinction between Alaska-specific and general regulations, and is contrary to legislative history demonstrating that the proponents of Section 103(c) intended that provision to ensure that

inholdings would not be governed by the regulations applicable to the surrounding federal CSU.

Amici curiae complement that analysis by demonstrating how the Ninth Circuit's decision in *Sturgeon* is also inconsistent with the very purpose of ANILCA, which is to complete the promises made in the Statehood Act and ANCSA. Furthermore, *amici curiae* demonstrate that the Ninth Circuit's holding will have consequences well beyond recreation in the National Parks by paving the way for federal agencies to curtail development on inholdings in all CSUs in Alaska, in direct contravention of the purpose for which those lands were granted in the first place.

ARGUMENT

I. The Primary Purpose of ANILCA is to Complete the Promises Made by the Statehood Act and ANCSA

The Court construes the plain language of a statute "with reference to the statutory context in which it is found and in a manner consistent with the [statute's] purpose." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 118 (2001). In addition, the Court "look[s] to the statute's language, structure, subject matter, context, and history—factors that typically help courts determine a statute's objectives and thereby illuminate its text." *Almendarez-Torres v. United States*, 523 U.S. 224, 228 (1998).

The Court in *Amoco Production Co. v. Village of Gambell, Alaska*, 480 U.S. 531 (1987), explained that "ANILCA's primary purpose was to complete the allocation of federal lands in the State of Alaska, a process begun with the Statehood Act in 1958 and

continued in 1971 in ANCSA." *Id.* at 549 (footnote omitted). Accordingly, the Court in *Amoco* looked to these "predecessor statutes" to give context to the plain language of ANILCA and to interpret the phrases "public lands" and "in Alaska" as used in Section 810 of ANILCA. *Id.* at 552.

Here too, the Statehood Act and ANCSA provide critical context to understanding the plain meaning of ANILCA Section 103(c). The Statehood Act in 1958 was intended to provide Alaska and its people the opportunity to develop the resources of the state. Under the Statehood Act, Alaska was promised 800,000 acres of public lands "for the purposes of furthering the development and expansion of communities" and further promised that it could select another 102,550,000 acres of land that were "vacant, unappropriated and unreserved." Pub. L. No. 85-508, § 6(a)-(b), 72 Stat. 339, 340 (1958). This land was to be patented to the state and included all mineral rights. *Id.* § 6(g), (i), 72 Stat. at 342. The "purpose of the land grants under" the Statehood Act is "to serve Alaska's overall economic and social well-being." *Udall v. Kalerak*, 396 F.2d 746, 749 (9th Cir. 1968).

The need for these large land grants was driven by aggressive federal policies setting aside the most valuable potential development areas in Alaska as reserves. Prior to statehood, Alaska faced the "peculiar problem" that "[o]ver 99 percent of the land area of Alaska is owned by the federal government." H.R. Rep. No. 85-624 (1957), *reprinted in* 1958 U.S.C.C.A.N. 2933, 2937 Although numerous laws existed authorizing disposition of federal lands to private individuals, those laws were being thwarted to "a large

degree by the federal policies . withdrawing from public use many of the more valuable resources of the territory." *Id.* These "tremendous federal reservations" were "for the furtherance of the programs of the various federal agencies." *Id.* Prior to statehood these reservations embraced "a preponderance of the more valuable resources" of the territory, with the remaining unreserved areas consisting of "glaciers, mountains, and worthless tundra." *Id.* at 2938.

The Statehood Act was intended to "alter the present distorted landownership pattern in Alaska." *Id.* To achieve that result, Alaska needed the opportunity to "select lands containing real values instead of millions of acres of barren tundra." *Id.* at 2939. The Statehood Act affords the state the opportunity to "select lands known or believe[d] to be mineral in character." *Id.* The intent was to provide the "valuable resources needed by the new state to develop flourishing industries with which to support itself and its people." *Id.* at 2938.

The efforts to implement the promises of the Statehood Act quickly ran into complications when Native groups asserted aboriginal rights to lands selected by the state. *See* H.R. Rep. No. 92-523 (1971), *reprinted in* 1971 U.S.C.C.A.N. 2192, 2193-94. Congress passed ANCSA "to provide an equitable solution to the claims made by the Natives of Alaska" while at the same time protecting the promises of the Statehood Act for lands "regarded as essential to the economic viability of the State." *Id.*

ANCSA, like the Statehood Act, used land grants as the primary mechanism for economic independence. Native Corporations were authorized to select over 40

million acres of land in Alaska. *Id.* at 2195. Of those millions of acres, "most of it will be selected for its economic potential." *Id.* This land was to serve "as a form of capital for economic development." *Id.* Thus, ANCSA, like the Statehood Act, focused on granting lands to drive Alaska's economy.

As with the Statehood Act, in passing ANCSA Congress intended that these lands be patented and passed out of federal ownership and control. 43 U.S.C. §§ 1611, 1613. ANCSA recognized the "interest of all of the people of the Nation in the wise use of the public lands," but made "a judgment about how much of the public lands in Alaska should be transferred to private ownership, and how much should be retained in the public domain." H.R. Rep. No. 92-523, *reprinted in* 1971 U.S.C.C.A.N. at 2194. The settlement in ANCSA represented a judgment "of what would be fair to the Natives, fair to the State of Alaska, and fair to all of the people of the United States." *Id.* at 2195. To that end ANCSA also authorized the Secretary of the Interior to set aside up to 80 million acres of unreserved federal land for public use. 43 U.S.C. § 1616(d)(2).

Implementation of these competing selections continued to prove problematic. *See* Petitioner's Opening Brief at 4-5. By 1979, the land grants under the Statehood Act were only 30 percent complete and grants under ANCSA were only one-eighth complete. *Amoco,* 480 U.S. at 549 n.18. Meanwhile, federal withdrawals continued at a rapid pace. Petitioner's Opening Brief at 4-5.

Congress, through ANILCA, sought to resolve these competing selections and withdrawal interests.

ANILCA designated over 100 million acres as federal CSUs[2] while ensuring "satisfaction of the economic and social needs of the State of Alaska." 16 U.S.C. § 3101(d). ANILCA concluded that these federal reservations were sufficient to protect "the national interest in the scenic, natural, cultural and environmental values on the public lands in Alaska" and that the need for future federal withdrawals "has been obviated." *Id.*; *see also* 16 U.S.C. § 3213 (severely restricting future executive withdrawals).

To ensure full "satisfaction" of the promises of the Statehood Act and ANCSA, Congress included Section 103(c) in ANILCA:

> Only those lands within the boundaries of any conservation system unit which are public lands (as such term is defined in this Act) shall be deemed to be included as a portion of such unit. No lands which, before, on, or after December 2, 1980, are conveyed to the State, to any Native Corporation, or to any private party shall be subject to the regulations applicable solely to public lands within such units. If the State, a Native Corporation, or other owner desires to convey any such lands, the Secretary may acquire such lands in accordance with applicable law (including this Act), and any such

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[2] "Conservation system unit" is defined as "any unit in Alaska of the National Park System, National Wildlife Refuge System, National Wild and Scenic Rivers Systems, National Trails System, National Wilderness Preservation System, or a National Forest Monument." 16 U.S.C. § 3102(4).

> lands shall become part of the unit, and be administered accordingly.

16 U.S.C. § 3103(c). These provisions confirm the promises of the Statehood Act and ANCSA; state and Native Corporation lands selected would not be "deemed to be included as a portion" of the National Park, National Monument, U.S. Forest Service Monument, Wildlife Refuge, or other CSU, and would not be regulated as such. Instead, those lands could be developed to utilize their promised economic potential.

Not only did Congress ensure that these lands within CSUs could still be developed, but Congress further guaranteed "adequate and feasible" access to such lands. Specifically, ANILCA Section 1110(b) provides:

> Notwithstanding any other provisions of this Act or other law, in any case in which State owned or privately owned land, including subsurface rights of such owners underlying public lands, or a valid mining claim or other valid occupancy is within or is effectively surrounded by one or more conservation system units, national recreation areas, national conservation areas, or those public lands designated as wilderness study, the State or private owner or occupier shall be given by the Secretary such rights as may be necessary to assure adequate and feasible access for economic and other purposes to the concerned land by such State or private owner or occupier and their successors in interest. Such rights shall be subject to reasonable regulations issued by the

> Secretary to protect the natural and other values of such lands.

16 U.S.C. § 3170(b). Simply put, "ANILCA provides access rights for inholders." *Hale v. Norton*, 476 F.3d 694, 699 (9th Cir. 2007).

In sum, ANILCA completes the promises made in the Statehood Act and ANCSA by ensuring that properties within the expansive CSU will not be subject to regulation as part of the CSU, and that property owners will have the access necessary to develop those lands.

II. The Ninth Circuit's Interpretation of Section 103(c) Conflicts with the Plain Language and Primary Purpose of ANILCA

A. The plain language of Section 103(c) precludes the application of all National Park Service regulations to inholdings in Alaska

Notwithstanding the fact that "ANILCA's primary purpose was to complete the allocation of federal lands in the State of Alaska" that began with the Statehood Act and ANCSA, *Amoco,* 480 U.S. at 549, the Ninth Circuit's decision in *Sturgeon* never mentions either predecessor statute.

Instead, the Ninth Circuit read the second sentence of Section 103(c) in isolation to conclude: "The plain text of § 103(c) only exempts nonfederal land from 'regulations applicable *solely* to public lands within [CSUs].'" *Sturgeon*, 768 F.3d at 1077 (brackets and emphasis in original) (quoting 16 U.S.C. § 3103(c)). The Ninth Circuit reasoned that the word "solely" was

used to indicate regulations that applied solely "in Alaska," and did not apply to regulations that applied to CSUs nationwide. *Id.* Because the regulation at issue banning hovercraft use applies to all National Park units, and not solely to the Yukon–Charley CSU in Alaska, the Ninth Circuit concluded that the regulation was not barred by Section 103(c). *Id.*

Even when read in isolation, this interpretation cannot possibly stand. Section 103(c) prohibits "regulations applicable *solely to public lands* within such units." 16 U.S.C. § 3103(c) (emphasis added). The word "solely" modifies the phrase "public lands." Thus the appropriate inquiry is whether the regulation applies "solely to public lands," not whether, as the Ninth Circuit held, the regulation applies solely "in Alaska."

The obvious intent of the inclusion of the phrase "regulations applicable solely to public lands within such units" was to target *all* public land regulations (i.e., National Park Service or U.S. Fish and Wildlife Service regulations) that would be applicable to that unit. This language gives effect to the first sentence of Section 103(c) that only federal lands "within the boundaries of any conservation system unit shall be deemed to be included as a portion of such unit." *Id.* At the same time, the language avoids, as Petitioner explains, any arguments that Congress was trying to exempt these inholdings from all applicable federal regulations that would impact development such as the Clean Water Act or the Clean Air Act. Petitioner's Opening Brief at 29 (citing Alaska National Interest Lands, Report of the Committee on Energy and

Natural Resources, U.S. Senate, S. Rep. No. 96-413, at 303 (1979), *reprinted in* 1980 U.S.C.C.A.N. 5070, 5247).

Moreover, the Ninth Circuit's conclusion that Congress intended Section 103(c) to exempt an inholding from land management regulations applicable *only* in Alaska makes little sense. Section 203 of ANILCA instructs the National Park Service to "administer" CSUs in Alaska as "new areas of the National Park System," in accordance with the National Park Service Organic Act. 16 U.S.C. § 410hh-2.[3] The only Alaska-specific regulations contemplated in ANILCA for these units are for things like permitting the continued use of aircraft in some areas (Section 201(6), (10)), authorizing motorized snow travel (Section 201(2)), or authorizing hunting (Section 203).

There is no logical reason why Congress would want to *exclude* private inholdings from the *benefit* of these Alaska-specific regulations (which are largely related to recreation and subsistence), but *include* private inholdings within the scope of general regulations that could preclude the very uses for which these lands were conveyed by the federal government. This illogical

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[3] The same reasoning applies to other CSUs in Alaska. Under ANILCA Section 304, the U.S. Fish and Wildlife Service is to manage Wildlife Refuges "in accordance with the laws governing the administration of units of the National Wildlife Refuge System, and this Act." Pub. L. No. 96-487, § 304(a), 94 Stat. 2371; *see also id.* § 402(a) (Bureau of Land Management "shall administer" CSU "pursuant to the applicable provisions of the Federal Land Policy and Management Act"); *id.* § 503(c) ("[T]he National Forest Monuments shall be managed by the Secretary of Agriculture as units of the National Forest System ").

result cannot stand. *W. Air Lines, Inc. v. Bd. of Equalization of S.D.*, 480 U.S. 123, 133 (1987) ("The illogical results of applying such an interpretation, however, argue strongly against the conclusion that Congress intended these results ").

B. The Ninth Circuit's interpretation of Section 103(c) undermines the purpose of ANILCA

The context under which ANILCA was passed fully confirms this commonsense reading that Section 103(c) exempts nonfederal land inside CSUs from being subject to the federal land management regulations applicable to a National Park, Monument, or Wildlife Refuge. As discussed above, the primary purposes of the Statehood Act and ANCSA are to provide the state and the Native Corporations with the lands that could be developed to support a vital economy. The plain intent of Section 103(c) is to exempt these selected lands, which happen to be within a federal CSU, from public land regulations that might restrict the development of state and private land. The people of Alaska were promised that their selections would be for "valuable resources to develop flourishing industries" not "worthless tundra." H.R. Rep. No. 85-624, *reprinted in* 1958 U.S.C.C.A.N. at 2938.

But the Ninth Circuit's decision immediately puts the decision for the development of any state or Native selection within the various CSUs right back into the hands of the National Park Service, the U.S. Fish and Wildlife Service, the Bureau of Land Management, or the U.S. Forest Service. Congress sought to exempt selected land (with exceptions) from the reach of these federal agencies. Unless the Court reverses, these

agencies will get to decide whether a selection within a CSU is developed for "valuable resources" or remains "worthless tundra."

Although this case arises in the context of navigable waters and recreation, the National Park Service has not limited its interpretation of Section 103(c) to these areas. One primary example is the National Park Service regulations governing solid waste disposal sites for mines. *See* 36 C.F.R. pt. 6. Under 36 C.F.R. § 6.7(d), no one can "establish or operate a new solid waste disposal site within a unit" of any National Park. This restriction applies to "all lands and waters within the units of the National Park System, whether federally or nonfederally owned." 36 C.F.R. § 6.2(a).

The preamble to the regulations at 36 C.F.R. part 6 explains, unequivocally, that these regulations will apply to inholding in CSUs in Alaska:

> It is the Service's opinion that the language of section 103(c) does not render the final rule at 36 CFR part 6 inapplicable to nonfederal lands in units of the National Park System in Alaska because of the presence of the word "solely."

59 Fed. Reg. 65948, 65950 (Dec. 22, 1994). The National Park Service reached that result by applying the same reasoning it put forward in *Sturgeon*: "neither the law[] nor its regulations appl[ies] 'solely' to public lands within the units." *Id.*

This regulation, if applied to Alaska under the reasoning urged by the National Park Service and endorsed by the Ninth Circuit, effectively forecloses mining on lands selected by the state or Native

Corporations under the Statehood Act and ANCSA within National Park Service CSUs. That is so because almost all large-scale mines must dispose on-site the overburden, waste rock, tailings, and other solid waste generated by their mining and mineral recovery and beneficiation processes. Any other approach is not practical or economic. Therefore, the prohibition in 36 C.F.R. § 6.7(d) eliminates any new mining operation on selected lands inside National Park Service CSUs.

These concerns are not theoretical. Ahtna, Incorporated, a Native regional corporation incorporated pursuant to ANCSA, has ANCSA selected lands inside the Wrangell-Saint Elias National Park, a CSU created by Section 201(9) of ANILCA. Those selections have significant potential for copper, gold, and other minerals[4] and could be developed (as intended by Congress in granting those lands) consistent with Title XI of ANILCA and laws of general applicability to mining.

Indeed, Congress expressly promised in Section 204 of ANILCA that "[v]alid Native Corporation selections within the boundaries of the Wrangell-Saint Elias National Park and Preserve . shall be honored." 16 U.S.C. § 410hh-3. But the Ninth Circuit's decision in *Sturgeon* authorizes the National Park Service to break that promise through the application of its nationally applicable regulations at 36 C.F.R. § 6.7(d). This is plainly contrary to congressional intent. *See Koniag, Inc. v. Koncor Forest Res.*, 39 F.3d 991, 997 (9th Cir. 1994) ("[W]e conclude that Congress did not intend to

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[4] Ahtna, http://ahtna-inc.com/lands/resources/ (last visited Nov. 17, 2015).

grant Koncor land [under ANCSA] whose value could be reduced to zero by fiat . . .").

The National Park Service has also overreached into nonfederal lands in Alaska with respect to oil and gas development. *See* 36 C.F.R. pt. 9, subpt. B. The National Park Service has issued a suite of regulations governing nonfederal oil and gas rights within parks and has made the regulations applicable to private lands. *See* 36 C.F.R. § 9.30(a) (applying requirements of subpart B where "the land is owned in fee"). Subpart B of part 9 imposes significant restrictions on oil and gas operations, requires a National Park Service plan of operation, and gives the National Park Service broad discretion to deny oil and gas operations. *Id.* §§ 9.36, 9.37

Equally troubling, the National Park Service is currently proposing to amend part 9, subpart B, to provide even more stringent restrictions on oil and gas operations. 80 Fed. Reg. 65572, 65572 (Oct. 26, 2015).[5] In that proposal, the National Park Service explains that it is relying on the Ninth Circuit's decision in *Sturgeon* to extend these restrictions to Alaska: "We also note that because these regulations are generally applicable to NPS units nationwide and to non-federal interests in those units," the restrictions would apply in Alaska "and thus are not affected by Section 103(c)

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[5] The existing regulations apply only to nonfederal oil and gas interests where access across federal lands is required. The proposed regulations would apply to all oil and gas operations on private land regardless of whether access across federal lands is required. 80 Fed. Reg. at 65575.

of ANILCA." *Id.* at 65573 (citing *Sturgeon*, 768 F.3d at 1077-78).

These concerns regarding the applicability of 36 C.F.R. part 9, subpart B, to Alaska parks are also not theoretical. Koniag, Inc., a Native regional corporation incorporated pursuant to ANCSA, received conveyance under ANCSA of subsurface estate potentially valuable for oil and gas[6] that is now within the Aniakchak National Monument. Here too, the Ninth Circuit's decision in *Sturgeon* authorizes the Parks to defeat the development potential of inholdings in Alaska through the application of general regulations.

These concerns are also not limited to CSUs under the National Park Service's authority. There are inholdings in many other CSUs that are either currently being developed or have significant future development potential. For example, Greens Creek mine is one of the largest silver mines in the world and is currently operating on private land in the Admiralty Island National Monument CSU, under the jurisdiction of the U.S. Forest Service.[7]

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[6] This conveyance was made pursuant to § 15 of the Act of January 2, 1976, Pub. L. No. 94-204, 89 Stat. 1145, 1154-55.

[7] The Green Creek mine comprises patented federal mining claims (in some of which a full fee simple estate was conveyed, while in others only a mineral fee estate was conveyed), other fee simple land, and various unpatented federal mining claims and dependent mill sites. *See* Alaska Department of Natural Resources, Greens Creek Mine, http://dnr.alaska.gov/mlw/mining/largemine/greenscreek/ (last visited Nov. 17, 2015).

There are many other examples. Significant hardrock mineral exploration is occurring on Native Corporation land within the Alaska Peninsula National Wildlife Refuge managed by the U.S. Fish and Wildlife Service. Numerous active placer mining operations exist within the Fortymile Wild and Scenic River CSU, under jurisdiction of the Bureau of Land Management.[8] Finally, lodges, camps, and recreational facilities are operated on private lands within many of the CSUs, including but not limited to Denali National Park and Preserve, Wrangell-St. Elias National Park and Preserve, Kodiak Island National Wildlife Refuge, and Admiralty Island National Monument.[9]

The Ninth Circuit in *Sturgeon* has provided these federal land managing agencies in Alaska with a road map to regulate these activities (and those that might develop in the future) out of existence and thereby subvert the purposes of ANILCA. Under the Ninth Circuit's holding, a federal land management agency can halt operations on inholdings in Alaska by putting restrictions on inholdings in a nationwide rule, even if the real impact is predominantly, if not exclusively, in Alaska. Even narrower, they could simply produce regulations that apply to inholdings in Alaska and *one other park unit outside Alaska*. In either case, the

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[8] *See* Alaska Department of Natural Resources, Upper Yukon Area Plan (February 2003), http://dnr.alaska.gov/mlw/planning/areaplans/up_yukon/pdf/uyap_full_plan.pdf (last visited Nov. 17, 2015).

[9] *See, e.g.*, Camp Denali Lodge, http://campdenali.com/live/page/about (last visited Nov. 17, 2015).

regulation would no longer be "solely" applicable to a CSU in Alaska under *Sturgeon*.

The result of that interpretation is that the *value* of Congress's promises to the state, Native Corporations, and other private land owners made in the Statehood Act, ANCSA and ANILCA for land and access to that land "could be reduced to zero by fiat." *Koniag*, 39 F.3d at 997. This result cannot be squared with the language and intent of ANILCA and its predecessor statutes.

C. The National Park Service reads the purpose of ANILCA too narrowly

The National Park Service's brief in opposition to certiorari attempts to justify the Ninth Circuit's decision by explaining that its ability to regulate state-owned rivers and lakes that are within its CSUs is essential. The National Park Service points to the purposes of individual CSUs that address the environmental integrity of streams and lakes, and argues that denying it the right to regulate those waters is "completely dissonant with the statute's stated purpose." Brief For The Respondents In Opposition at 17. This argument has a number of flaws.

Initially, at least one other federal agency that has addressed this issue has disagreed. The Secretary of Agriculture, under ANILCA, manages National Forest units of the National Wild and Scenic Rivers System, National Trails System, and National Wilderness Preservation System, and National Forest Monuments. In issuing regulations in 2003, the Secretary expressly agreed with comments from the State of Alaska that

pursuant to ANILCA Section 103(c) the new "regulations would not apply to State-owned lands and waters, including navigable waters, shore lands, tidelands, and submerged lands within the boundaries of national forests in Alaska," and the State of Alaska would continue to manage these waters. 68 Fed. Reg. 35116, 35117 (June 11, 2003). This is in direct contrast to the National Park Service's claim that it must manage the waters within a unit to fulfill the intent of ANILCA.

Equally important, the National Park Service's identified values in protecting "the national interest in the scenic, natural, cultural and environmental values on the public lands in Alaska" are only one part of ANILCA's purpose. 16 U.S.C. § 3101(d). The other purpose of ANILCA is ensuring "satisfaction of the economic and social needs of the State of Alaska." *Id.* As this Court explained, completing the selections of the Statehood Act and ANCSA is the "primary purpose" of ANILCA. *Amoco*, 480 U.S. at 549.

The state's ownership of the bed and banks of navigable waters is an express and important part of the promise of the Statehood Act. Pub. L. No. 85-508, § 6(m), 72 Stat. at 343 (granting title to the state through the Submerged Lands Act). The bed and banks on state waters are an important source of Alaska's economic development. Placer mining in streams and rivers and along portions of Alaska's coast, fueled Alaska's gold rushes and continues to be a multimillion-dollar industry in Alaska, with over 600

permitted mines.[10] Some of these placer mines occur in CSUs including, significantly, in various components of the Fortymile Wild and Scenic River CSU designated by Section 603 of ANILCA.

Likewise, the bed and banks of navigable waters (including not only lands underlying inland navigable waters but also tidelands and submerged lands along the coasts of Alaska) are important for oil and gas leasing, and an important source of state revenue. The state has leased submerged lands for oil and gas throughout Alaska.[11]

When Alaska achieved statehood, some of these important submerged lands areas had already been expressly reserved by unilateral executive action, including key submerged lands in the National Petroleum Reserve. *See United States v. Alaska*, 521 U.S. 1, 36 (1997) (reservation included submerged lands). The Statehood Act was intended to halt this policy of creating "tremendous federal reservations" to serve "the programs of the various federal agencies," and give the state the properties, including submerged lands, necessary for it to build an economic base. H.R. Rep. No. 85-624, *reprinted in* 1958 U.S.C.C.A.N. at 2937 Excluding the remaining submerged lands from the reach of federal land managers is therefore entirely

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[10] *See* McDowell Group, The Economic Impacts of Placer Mining in Alaska (Oct. 2014), http://alaskaminers.org/placer-mining/.

[11] *See, e.g.*, North Slope Units Map (showing state owned submerged oil and gas leases on the North Slope, http://dog.dnr.alaska.gov/Units/Documents/UnitMaps/NorthSlope/NorthSlopeUnitsMap-201509.pdf (last visited Nov. 17, 2015).

consistent with purpose of ANILCA, and the National Park Service's arguments must fail.

CONCLUSION

The decision of the Ninth Circuit is contrary to the plain language and purpose of ANILCA and the Court should reverse.

Respectfully submitted,

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No. 14-1209

In the Supreme Court of the United States

JOHN STURGEON,

Petitioner,

v.

BERT FROST, in His Official Capacity as Alaska Regional Director of the National Park Service, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF ARCTIC SLOPE REGIONAL CORPORATION, COOK INLET REGION, INC., AND SALAMATOF NATIVE ASSOCIATION, INC. AS *AMICI CURIAE* IN SUPPORT OF PETITIONER AND REVERSAL

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTERESTS OF THE *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 5

I. THE NINTH CIRCUIT'S UNPRECEDENTED READING OF ANILCA SECTION 103(c) IMPROPERLY EXTENDS FEDERAL REGULATORY AUTHORITY OVER MILLIONS OF ACRES OF NATIVE CORPORATION LANDS 5

A. Land Ownership in Alaska 5

B. ASRC Lands 9

C. CIRI Lands 10

D. Effects of the Ninth Circuit's Ruling ... 10

II. SECTION 103(c) OF ANILCA DIRECTLY PROHIBITS NPS FROM EXERCISING REGULATORY CONTROL OVER NATIVE CORPORATION, STATE, AND PRIVATE LAND THAT IS LOCATED WITHIN THE MAPPED BOUNDARIES OF AN ALASKA CSU, THUS RENDERING NPS REGULATIONS INAPPLICABLE ON SUCH LANDS 15

A. The Plain Text of Section 103(c) Unambiguously Precludes NPS Enforcement over Native Corporation, State, and Private Lands 16

B. The Structure and Context of ANILCA as a Whole Reinforce the Plain Meaning of Section 103(c) 21

C. The Legislative History Confirms this Plain Meaning 25

D. The Unambiguously Expressed Intent of Congress Forecloses NPS Regulation of Native Corporation, State, and Private Land Within CSUs 26

III. NO CONSTITUTIONAL BASIS EXISTS FOR THE BROAD REGULATORY POWER THE NINTH CIRCUIT FOUND IN SECTION 103(c) OF ANILCA 27

CONCLUSION 34

TABLE OF AUTHORITIES

CASES

Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.,
467 U.S. 837 (1984) 15, 16

City of Saint Paul v. Evans,
344 F.3d 1029 (9th Cir. 2003) 7

Clark v. Martinez,
543 U.S. 371 (2005) 31, 32

FDA v. Brown & Williamson Tobacco Corp.,
529 U.S. 120 (2000) 15, 16, 25

Free Enter. Canoe Renters Ass'n of Mo. v. Watt,
711 F.2d 852 (8th Cir. 1983) 29

Gonzales v. Oregon,
546 U.S. 243 (2006) 16

Hawaii v. Office of Hawaiian Affairs,
556 U.S. 163 (2009) 16

Kansas v. Colorado,
206 U.S. 46 (1907) 29

King v. Burwell,
135 S. Ct. 2480 (2015) 16

Kleppe v. New Mexico,
426 U.S. 529 (1976) 29

Loughrin v. United States,
134 S. Ct. 2384 (2014) 19

New England Power Co. v. New Hampshire,
455 U.S. 331 (1982) 30

Sosa v. Alvarez-Machain,
542 U.S. 692 (2004) 19

Sturgeon v. Masica,
768 F.3d 1066 (9th Cir. 2014) 13, 30

Trs. For Alaska v. State,
736 P.2d 324 (Alaska 1987) 6

United States v. Lindsey,
595 F.2d 5 (9th Cir. 1979) 29

United States v. Santos,
553 U.S. 507 (2008) 32

CONSTITUTION AND STATUTES

U.S. Const. art. I, § 8, cl. 3 ..... 4, 28, 30, 32

U.S. Const. art. IV, § 3, cl. 2 ..... 4, 28, 29, 30

16 U.S.C. § 1a-2(h) 28

Alaska National Interest Lands Conservation Act of 1980, Pub. L. No. 96-487, 94 Stat. 2371, (codified at 16 U.S.C. § 3101 *et seq.*) ..... *passim*

16 U.S.C. § 3101(a) 7, 22

16 U.S.C. § 3101(b) 2, 7, 22

16 U.S.C. § 3101(c) 2, 7, 22

16 U.S.C. § 3101(d) 2, 7, 22, 23

16 U.S.C. § 3102(2) 7, 19, 20

16 U.S.C. § 3102(3) 7, 18, 19, 20

16 U.S.C. § 3103(b) 8, 18, 20

16 U.S.C. § 3103(c) ..... *passim*

16 U.S.C. § 3111(1) 2

16 U.S.C. § 3111(4) 2, 7, 23, 31

16 U.S.C. § 3111(5) 2, 7, 23

16 U.S.C. § 3112 ..... 2, 7, 24

16 U.S.C. § 3202 16

ANILCA § 201 24

ANILCA § 201-203 16

ANILCA § 304(f)(1) 24

ANILCA § 801 31

Alaska Native Claims Settlement Act of 1971 , Pub. L. No. 92-203, 85 Stat. 688 (codified at 43 U.S.C. § 1601 *et seq.*) ..... *passim*

ANCSA § 2(a), 43 U.S.C. § 1601(a) 6

ANCSA § 2(b), 43 U.S.C. § 1601(b) 12

ANCSA § 7, 43 U.S.C. § 1606 6

43 U.S.C. § 1606(i) 7, 14

43 U.S.C. § 1606(j) 7, 14

ANCSA § 8, 43 U.S.C. § 1607 ..... 6, 7

ANCSA § 12, 43 U.S.C. § 1611 7

ANCSA § 14, 43 U.S.C. § 1613 7

Alaska Statehood Act, Pub. L. No. 85-508, 72 Stat. 339 (1958), *reprinted in* 48 U.S.C. ch. 2, refs. & annots., as amended 6

REGULATIONS

36 C.F.R. § 1.2(a)(1), (3) 28

36 C.F.R. § 1.2(a)(3) 28

36 C.F.R. § 1.2(b) 4, 28, 34

36 C.F.R. § 1.4(a) 11

36 C.F.R. § 2.1(a)(1) 11

36 C.F.R. § 2.1(c)(1) 11

36 C.F.R. § 2.2 11

36 C.F.R. § 2.3 11

36 C.F.R. § 2.5 12

36 C.F.R. § 2.10 ..... 11, 13

36 C.F.R. § 2.13 29

36 C.F.R. § 2.17 11

36 C.F.R. § 2.18 11

36 C.F.R. § 2.51 12

36 C.F.R. § 2.52 12

36 C.F.R. § 3.8 11

36 C.F.R. § 4.10 11

36 C.F.R. § 4.30 11

36 C.F.R. § 5.3 12

36 C.F.R. § 5.7 11

36 C.F.R. § 13.25 13

36 C.F.R. § 13.160 12

36 C.F.R. § 13.410 12

OTHER AUTHORITIES

80 Fed. Reg. 65572 (Oct. 26, 2015) 13

S. Rep. No. 96-413 (1979), *as reprinted in* 1980 U.S.C.C.A.N. 5070 26

INTERESTS OF THE *AMICI CURIAE*

Arctic Slope Regional Corporation ("ASRC"), Cook Inlet Region, Inc. ("CIRI"), and Salamatof Native Association, Inc. ("SNAI") (collectively, "*amici*") submit this brief as *amici curiae* in support of Petitioner and reversal of the Ninth Circuit's opinion in *Sturgeon v. Masica* (No. 14-1209).[1] ASRC and CIRI are two of Alaska's twelve private, for-profit, Alaska Native regional corporations formed under the Alaska Native Claims Settlement Act of 1971 ("ANCSA"), Pub. L. No. 92-203, 85 Stat. 688 (codified at 43 U.S.C. § 1601 *et seq.*). SNAI is an ANCSA village corporation within the Cook Inlet region.

ASRC, Alaska's largest locally owned business, is owned by approximately 13,000 Iñupiat Eskimo shareholders, most of whom reside in Alaska's North Slope region. CIRI, the regional corporation for the Southcentral region of the State including the city of Anchorage, is owned by a diverse group of 7,300 Alaska Native shareholders from more than six different Native groups. *Amici* own significant ANCSA lands within the outer boundaries of federal conservation system units ("CSUs").

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[1] In accord with Supreme Court Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and no such counsel or party made any monetary contribution intended to fund the preparation or submission of this brief. Counsel of record for all parties received timely notice of *amici*'s intention to file this brief, and consent to file was granted by all parties. Letters reflecting the parties' consent to the filing of this brief have been filed with the Clerk.

Through the Alaska National Interest Lands Conservation Act of 1980, ("ANILCA" or the "Act"), Pub. L. No. 96-487, 94 Stat. 2371 (codified at 16 U.S.C. § 3101 *et seq.*), Congress balanced the conservation interests of the federal government with the economic development and subsistence interests of ANCSA corporations like ASRC and CIRI. The Ninth Circuit expanded federal regulatory authority over Native corporations' lands through a contorted misreading of the very provision in ANILCA meant to limit that authority. This ruling dramatically upsets the balance Congress struck in ANILCA, undermining the purpose of ANCSA to the great detriment of *amici*'s shareholders and those of their fellow Native corporations.

SUMMARY OF ARGUMENT

Congress, in its passage of ANILCA, made clear that its purpose was to balance conservation interests with the preservation of the subsistence way of life for its rural residents, with a particular focus on Alaska Natives. *See* 16 U.S.C. §§ 3101(b)-(c), 3111(1). Although these interests swept broadly, Congress was clear that ANILCA would accomplish its goals through the expansion of, and regulation of, "*public lands*," *i.e.* federal lands (expressly excluding State and Native corporation lands). *See, e.g.*, 16 U.S.C. §§ 3101(c)-(d), 3103(c), 3111(4)-(5), 3112. ANILCA was *not* intended to regulate Native corporation (or State or private) property falling within the geographically-drawn boundaries of CSUs; rather, Congress was explicit that only "public lands" within such boundaries were "deemed to be included as a portion of such unit." *See* ANILCA § 103(c), 16 U.S.C. § 3103(c).

Congress's limitation in ANILCA to regulating only "*public lands*" was critical to avoid undermining ANCSA, enacted nearly ten years earlier in 1971. Rather than placing lands in trust for Native people (as was done in the lower 48 states), ANCSA created Native corporations that would hold title to lands on which they could maintain a subsistence way of life and pursue economic development. Native Alaskans' ability to pursue those interests on lands falling within the geographically mapped areas of CSUs will be completely frustrated if ANILCA is interpreted to instead permit National Park Service ("NPS") regulation over their lands.

This case presents a straightforward issue of statutory interpretation. The Ninth Circuit misinterpreted ANILCA section 103(c) as an expansion of federal regulatory authority over millions of acres of private lands located within the boundaries of CSUs in Alaska, rather than as the limitation Congress intended. Section 103(c)'s plain language unambiguously confirms that NPS's regulatory authority extends only to "public lands" owned by the federal government, not to the private inholdings owned by the Native corporations, the State, or other private parties. The broader purpose, context, and structure of ANILCA reinforce the plain meaning of section 103(c), which is entirely consistent with Congress's focus in the rest of the Act upon regulating the "public lands" in Alaska.

The Ninth Circuit's interpretation of section 103(c) unconstitutionally extends broad federal regulatory authority over millions of acres of private lands without a source of authority for such regulation under either

the Property Clause or the Commerce Clause. Both the Ninth Circuit and the United States attempt to sidestep this constitutional problem by focusing on the particular hovercraft regulation at issue here and relying on an asserted federal interest in navigable waters. But the Ninth Circuit's interpretation extends far more broadly than navigable rivers. Both the district court and the Ninth Circuit rejected the United States' invitation to decide this case by finding a federal interest in the waters at issue sufficient to justify the hovercraft regulation impacting John Sturgeon. Before the lower courts decided this case, NPS had never before interpreted its powers to allow regulation of all State, Native corporation, or other non-federal lands within the NPS boundaries. And the NPS regulations themselves expressly state that they do not generally apply on "non-federally owned lands and waters or on Indian tribal trust lands located within National Park System boundaries." 36 C.F.R. § 1.2(b).

The district court and the Ninth Circuit both went much further than NPS asked. Those courts interpreted section 103(c) as a broad source of authority to apply general NPS regulations to State, Native corporation and private lands within the boundaries of the CSUs. No constitutional basis supports this broad, new grant of regulatory authority.

ARGUMENT

I. THE NINTH CIRCUIT'S UNPRECEDENTED READING OF ANILCA SECTION 103(c) IMPROPERLY EXTENDS FEDERAL REGULATORY AUTHORITY OVER MILLIONS OF ACRES OF NATIVE CORPORATION LANDS.

The Ninth Circuit held that under section 103(c) of ANILCA, federal CSU regulations of nationwide applicability extend to State and privately owned inholdings in Alaska's national parks and refuges. Eighteen million acres of land conveyed to Alaska Native corporations under ANCSA are profoundly affected by this ruling.

A. Land Ownership in Alaska

Alaska's primary resource is its land. At 365.5 million acres, Alaska is more than twice as large as Texas. This vast terrain serves numerous local and national interests and goals, including economic development, energy security, environmental conservation, and subsistence use. In service of these goals, Congress has divided Alaska among three primary landowners: the federal government, the State itself, and the Alaska Native corporations. Together they hold over ninety-nine percent of Alaska; less than one percent of the state is held in traditional private ownership.[2]

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[2] A Department of the Interior map showing the State, Native corporation, and different categories of federal government lands in Alaska is available at http://www.asrc.com/lands/Pages/alaska%20maps.aspx.

A fundamental purpose of Congress's land conveyances to the State and Native corporations was to ensure their respective economic development and social well-being, and Alaskans' subsistence way of life. The Statehood Act, for its part, was enacted in 1958, and gave twenty-eight percent of Alaska's total area to the new state in order to "ensure [its] economic and social well-being . . . ."[3] *Trs. For Alaska v. State*, 736 P.2d 324, 335 (Alaska 1987). Land owned by the State of Alaska approximates the State of California in size.

The Statehood Act reserved the issue of aboriginal land claims of Alaska's indigenous people. Congress's passage of ANCSA in 1971 expressly resolved those claims. ANCSA addressed the "need for a fair and just settlement of all claims by Natives and Native groups of Alaska, based on aboriginal land claims." ANCSA § 2(a), 43 U.S.C. § 1601(a). The statute created twelve for-profit regional corporations and more than two hundred village corporations in the State and made Alaska's Native people shareholders in those corporations. *See* ANCSA §§ 7–8, 43 U.S.C. §§ 1606-1607.

ANCSA called for conveyance of approximately 44 million acres of federal land to Alaska Native regional and village corporations, making the Native corporations as a group the third-largest landowner in

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[3] Alaska Statehood Act, Pub. L. No. 85-508, 72 Stat. 339 (1958), *reprinted in* 48 U.S.C. ch. 2, refs. & annots., as amended; *Trs. for Alaska v. State*, 736 P.2d 324, 337 (Alaska 1987) (explaining that Congress's debates show it "recognized the financial burden awaiting the new state" and that "the large statehood land grant and the grant of the underlying mineral estate were seen as important means by which the new state could meet that burden").

the State. *See* ANCSA §§ 12, 14, 43 U.S.C. §§ 1611, 1613. Congress specifically intended the Native corporations to use their ANCSA lands largely for economic development benefiting the Native people of Alaska. *See* ANCSA § 8, 43 U.S.C. § 1607; *City of Saint Paul v. Evans*, 344 F.3d 1029, 1031 (9th Cir. 2003). And ANCSA provided that Native people statewide would benefit economically from the wealth-producing lands conveyed to all Native corporations, specifically including a structure through which the different corporations would share their profits. ANCSA § 7(i)-(j), 43 U.S.C. § 1606(i)-(j).

Nearly ten years after passing ANCSA, Congress enacted the Alaska National Interest Lands Conservation Act of 1980. The purpose of ANILCA was two-fold: to preserve the natural landscapes in Alaska and its wildlife, while also allowing rural residents to maintain their subsistence way of life. 16 U.S.C. § 3101(b)-(c). Congress was clear that ANILCA was *not* intended to impede upon Native corporations' or the State's control of their own lands conveyed under ANCSA and the Statehood Act. Rather, Congress repeatedly emphasized in ANILCA that regulation under that Act was to be limited to "public lands," which were by definition specifically limited to "*Federal* lands" in Alaska (specifically excluding certain State and Native corporation lands). *See* 16 U.S.C. § 3102(2)-(3) (definitions of "public lands" and "Federal land"); *see also* 16 U.S.C. §§ 3101(d), 3103(c), 3111(4)-(5), 3112 (all making express that federal regulation was to be limited to "public lands"). ANILCA established "units" which would be federally regulated as new or expanded national parks, preserves, monuments or wildlife refuges. *See* 16 U.S.C. § 3101(a). These newly

expanded areas were to be reflected on maps with boundaries drawn to "follow hydrographic divides or embrace other topographic or natural features." 16 U.S.C. § 3103(b). But Congress made clear that though mapping the boundaries in this way would encompass certain Native corporation and State lands, only the "public lands" within such boundaries would "be deemed to be included as a portion of such unit." 16 U.S.C. § 3103(c).

Over 120 million of Alaska's federally owned acres are now protected within federal CSUs. These include fifteen national parks, preserves, and monuments managed by NPS and sixteen national wildlife refuges managed by the United States Fish and Wildlife Service, most of which were created or expanded by ANILCA. The ANILCA-created federal CSUs ultimately engulfed over eighteen million acres of ANCSA corporation-owned land—vast islands of private land within CSUs.[4] Eleven of Alaska's twelve regional corporations and many of its over 200 village corporations own inholdings within ANILCA CSUs, and many Native people live on these lands in rural villages.

These eighteen million acres of ANCSA inholdings, over forty percent of all ANCSA lands, may now be subject to NPS regulations under the Ninth Circuit's decision. The Ninth Circuit's contortion of section

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[4] Many hundred private homestead sites were also engulfed by federal conservation lands under ANILCA. These private landowners are unlikely to muster the resources to make themselves heard in this Court, but their interests are markedly affected by the Ninth Circuit's ruling as well.

103(c) of ANILCA expanded federal regulatory authority over Native corporations' lands through the very provision meant to limit that authority. This ruling dramatically upsets the balance Congress struck in ANILCA, undermining the purpose of ANCSA to the great detriment of the Native corporations' shareholders.

B. ASRC Lands

ASRC holds title to nearly five million acres of ANCSA land in the northernmost part of the state, known as the "North Slope" of the Brooks Mountain Range. Its shareholders live primarily in eight extremely remote arctic villages in one of the most isolated and challenging environments in the world. More than 380 thousand of ASRC's acres are "inholdings" situated within the Gates of the Arctic National Park, the Alaska Maritime National Wildlife Refuge, and the Arctic National Wildlife Refuge ("ANWR"), all federal CSUs created or expanded by ANILCA.

ASRC's inholdings are home to many ASRC shareholders residing in two villages located on its inholdings within CSUs—Anaktuvuk Pass within Gates of the Arctic National Park and Kaktovik on the coastal plain within ANWR. These inholdings are necessary to ASRC's shareholders for subsistence use and economic development. The health of, and access to, caribou herds, fish, water fowl, Dall sheep, musk oxen, marine mammals, and other subsistence food populations are critically important to ASRC's people. Many of the inholding acres also have high potential for oil and gas development, other mineral development, tourism, and other economic uses.

C. CIRI Lands

CIRI owns well over a million acres of surface and subsurface land, both inside and outside CIRI's Southcentral Alaska region. Over its history, CIRI has paid more than one billion dollars in dividends and distributions to its shareholders, largely due to its rich land resources. Those lands include nearly sixty thousand acres of subsurface inholdings within Lake Clark National Park. The ANCSA village corporations in CIRI's region own significant surface acreage in Lake Clark National Park, lands with significant potential for tourism development. CIRI also holds nearly 200 thousand acres of oil and gas producing subsurface estate within the Kenai National Wildlife Refuge. Village corporations in the CIRI region similarly hold surface and subsurface interests in the Kenai National Wildlife Refuge.[5] Due to the relatively heavy development in its region of the State and other factors, CIRI has remaining land entitlements to select, forty-four years after the passage of ANCSA. CIRI is unique among the ANCSA corporations in this respect, and the Ninth Circuit's decision has serious implications for CIRI's future selections.

D. Effects of the Ninth Circuit's Ruling

Federal regulatory authority over ANCSA lands is an issue of tremendous economic and social importance to Alaska Native corporations, and ASRC and CIRI in particular. Moreover, given oil and natural gas

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[5] Amicus SNAI is one of the six Village Corporations associated with Regional Corporation CIRI. It owns significant surface lands in CSUs to which CIRI owns the subsurface interest.

development possibilities on some of the affected State and Native-owned lands, the decision also has potential nationwide consequences.

In national parks, human activity is intensely regulated for the purpose of protecting wildlife and the scenic wilderness character of the parks. Endless aspects of the use of the land are covered by the Code of Federal Regulations. Under the Ninth Circuit's reading of ANILCA, forty percent of private ANCSA lands may now be subject to this vast regulatory scheme. Innumerable activities integral to economic and social life on inholdings can fall within the regulatory ambit of the federal government.

The day-to-day consequences of applying the general NPS regulations to private inholdings would be stunning. Buildings may not be constructed in national parks without advance approval from the federal government. 36 C.F.R. § 5.7. Hunting and fishing on park lands are subject to extensive restrictions and permitting requirements. *Id.* §§ 2.1(a)(1), 2.2, 2.3. Camping is limited to designated areas; levelling ground or altering a site to make it more suitable for camping is prohibited. *Id.* § 2.10. Even gathering berries requires written findings from a park superintendent. *Id.* § 2.1(c)(1). Modes of transportation critical in rural Alaska such as snowmobiles, ATVs, watercraft, and even bicycles, are all limited to locations approved by the park service. *Id.* §§ 1.4(a) (definitions of "vehicle" and "vessel"), 2.18, 3.8, 4.10, 4.30. Aircraft—another critical aspect of access to rural Alaska communities—may be used only in designated locations and by permit. *Id.* § 2.17.

Commercial activities are circumscribed and regulated. *Id.* § 5.3. Research may be conducted only by specific institutions and agencies and only under the regulatory watch of the park service. *Id.* § 2.5. Public meetings, demonstrations and distribution of printed materials all require permits and federal government oversight. *Id.* §§ 2.50, 2.51, 2.52.

The Ninth Circuit's ruling will impede any efforts by ANCSA shareholders to develop their Native corporation lands within the geographical boundaries of a national park for ecotourism, either in the form of lodges or even through modest endeavors like providing basic trails, tent sites, and hiking permits to visitors. Buildings, trails, or roads of any kind potentially may not be constructed without permission under NPS regulations. Businesses in Native villages may be required to seek permits from federal agencies in order to do business. The result will fundamentally frustrate "the real economic and social needs of Natives" which were of fundamental concern to Congress in ANCSA. ANCSA § 2(b), 43 U.S.C. § 1601(b).

The Ninth Circuit's distinction between nationwide and Alaska-specific regulations, applying the former but not the latter on inholdings, leads to even more absurd results. Subsistence use is specifically permitted in many Alaska CSUs, including the use of subsistence cabins, *see, e.g.*, 36 C.F.R. §§ 13.160, 13.410, but subsistence use is generally not allowed under the nationwide regulations. Applying nationwide regulations on the inholdings, as the Ninth Circuit's interpretation requires, means that NPS could forbid Native hunters from using their ATVs or snowmobiles to carry game back to the village. But on

most Alaska National Parks themselves, less restrictive Alaska-specific park regulations that the Ninth Circuit has held would be inapplicable to Native corporation lands within national parks, often permit such travel. Similarly, under the nationwide regulations that the Ninth Circuit has applied to inholdings, camping is generally restricted to designated areas; in Alaska parks, it is generally allowed. *Compare id.* § 2.10, *with id.* §13.25. Many more examples exist.

NPS, in an effort to minimize the broad effect of the Ninth Circuit's holding, has recharacterized the Ninth Circuit's decision, asserting that it does not serve "to extend the gamut of parks regulations to privately held, state-held, and Native-held inholdings." U.S. Cert. Opp. 22. But the government's narrow characterization does not square with the Ninth Circuit's decision itself or the broad license NPS has already taken as a result of that decision. Just two months after the filing of the Solicitor General's Brief in Opposition to a grant of certiorari in this case, NPS expressly relied on the Ninth Circuit's decision in a proposed rule seeking to extend federal oil and gas permitting regulations to previously exempt Native-owned lands within the boundaries of CSUs in Alaska. 80 Fed. Reg. 65572, 65572-65573 (Oct. 26, 2015) ("We also note that because these regulations are generally applicable to NPS units nationwide and to non-federal interests in those units, they are not 'applicable solely to public lands within [units established under ANILCA,]' and thus are not affected by section 103(c) of ANILCA. *See Sturgeon v. Masica*, 768 F.3d 1066, 1077-78 (9th Cir. 2014).").

This proposed rule makes clear that the Ninth Circuit's ruling is not limited to hovercraft regulation of navigable waters over submerged land owned by the State. Instead, NPS views the ruling as a license to regulate oil and gas permitting over Native corporations' lands within the geographical boundaries of CSUs, the very sort of economic development that Congress recognized in ANCSA was vital to Native corporations. Despite NPS protestations to the contrary in briefing to this Court, the Ninth Circuit's decision grants NPS broad discretion to extend regulatory authority to millions of acres of Native corporation, State and private lands.

Taking a vast federal regulatory regime aimed at public land conservation and enforcing it on private, ANCSA land undermines the purposes of both ANCSA and ANILCA, to the detriment of *amici* and all Alaskans. ANCSA lands were granted to Alaska's Native people so that they may freely live, work, and engage in subsistence activity and commerce there. And of course, part of Alaska's oil and other mineral wealth was specifically granted to ANCSA corporations in order to ensure the economic stability of Alaska's Native people. The land wealth held by ASRC and CIRI benefits not only their own shareholders, but Alaska Native people statewide through the revenue sharing provisions of ANCSA. ANCSA § 7(i)-(j), 43 U.S.C. § 1606(i)-(j).

II. SECTION 103(c) OF ANILCA DIRECTLY PROHIBITS NPS FROM EXERCISING REGULATORY CONTROL OVER NATIVE CORPORATION, STATE, AND PRIVATE LAND THAT IS LOCATED WITHIN THE MAPPED BOUNDARIES OF AN ALASKA CSU, THUS RENDERING NPS REGULATIONS INAPPLICABLE ON SUCH LANDS.

The District Court and Ninth Circuit both erred in their interpretation of the scope of NPS regulatory control accorded by ANILCA over Native corporation, State, and private land. Both courts myopically focused upon "the second sentence of §103(c) [as] dispositive in this case," Pet. App. 56a, and then found that the meaning of the statute turned upon *a single word* in one phrase of that second sentence: "The plain text of § 103(c) only exempts nonfederal land from 'regulations applicable *solely* to public lands within [CSUs].'" Pet. App. 25a (quoting 16 U.S.C. § 3103(c) (emphasis and alteration added by Ninth Circuit)). This approach blatantly disregards this Court's instruction under *Chevron* to determine "whether Congress has directly spoken to the precise question at issue," in which case the court "must give effect to the unambiguously expressed intent of Congress." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 121, 125 (2000) (quoting *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984)).[6]

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[6] Because the statutory text is unambiguous, NPS's invitation for this Court to apply *Chevron* deference is misplaced. Congress has "directly spoken to the precise question at issue" in both the statute itself and in the legislative history as discussed herein.

Rather, "[i]n determining whether Congress has specifically addressed the question at issue, a reviewing court should not confine itself to examining a particular statutory provision in isolation. The meaning—or ambiguity—of certain words or phrases may only become evident when placed in context." *Id.* at 132; *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) (same). When "deciding whether the language is plain," words must be read "in their context and with a view to their place in the overall statutory scheme." *Burwell*, 135 S. Ct at 2489 (quoting *Brown & Williamson*, 529 U.S. at 133). The Ninth Circuit's isolation of the word "solely" within the second phrase of the second sentence of section 103(c) incorrectly ignored that principle.

A. The Plain Text of Section 103(c) Unambiguously Precludes NPS Enforcement over Native Corporation, State, and Private Lands.

"[B]egin[ning], as always, with the text of the statute," *Hawaii v. Office of Hawaiian Affairs*, 556 U.S. 163, 173 (2009) (internal quotation omitted), section 103(c) of ANILCA provides as follows:

Chevron, 467 U.S. at 842. Further, to receive deference, "the rule [in question] must be promulgated pursuant to authority Congress has delegated to [an] official." *Gonzales v. Oregon*, 546 U.S. 243, 258 (2006). But ANILCA grants NPS the authority to administer only "units of the National Park System," ANILCA §§ 201-203; *see also* 16 U.S.C. § 3202, not State, Native corporation, or private land. *Chevron* deference cannot be used to expand federal regulatory authority not found in a statute.

> **(c) Lands included within unit; acquisition of land by Secretary**
>
> Only those lands within the boundaries of any conservation system unit which are public lands (as such term is defined in this Act) shall be deemed to be included as a portion of such unit. No lands which, before, on, or after December 2, 1980, are conveyed to the State, to any Native Corporation, or to any private party shall be subject to the regulations applicable solely to public lands within such units. If the State, a Native Corporation, or other owner desires to convey any such lands, the Secretary may acquire such lands in accordance with applicable law (including this Act), and any such lands shall become part of the unit, and be administered accordingly.

16 U.S.C. § 3103(c). All three sentences, not just the second clause in the second sentence, bear on the issue of NPS's authority over Native Corporation, State, and private lands.

The first sentence alone draws a clear distinction between those lands that are, and those lands that are not, subject to NPS authority under the Act: "*Only* those lands within the boundaries of any conservation system unit which are *public lands* (as such term is defined in this Act) *shall be deemed to be included as a portion of such unit*." 16 U.S.C. § 3103(c) (emphasis added). In other words, even though Congress directed that the boundaries of the maps showing "each change in land management status effected by this Act . . . . [w]henever possible . . . shall follow hydrographic divides or embrace other topographic or natural

features," 16 U.S.C. § 3103(b), the actual lands "deemed to be included" as part of the CSUs, and thus "effected by this Act," were limited to the "public lands (as such term is defined in this Act)" that fell within those boundaries. *Id.* § 3103(b)-(c). By necessary implication, lands falling outside the statutory definition of "public lands," but that nonetheless fell within the mapped boundaries of a CSU, are not part of that CSU. Those lands thus are not subject to any NPS regulation—whether of general applicability to National Parks or the CSUs in particular—because they are not subject to any "change in land management status effected by [the] Act."

The term "public lands (as such term is defined in this Act)," is expressly defined as follows:

> (3) The term "public lands" means land situated in Alaska which, after December 2, 1980, are Federal lands, except—
>
> > (A) land selections of the State of Alaska which have been tentatively approved or validly selected under the Alaska Statehood Act and lands which have been confirmed to, validly selected by, or granted to the Territory of Alaska or the State under any other provision of Federal law;
> >
> > (B) land selections of a Native Corporation made under the Alaska Native Claims Settlement Act [43 U.S.C. 1601 et seq.] which have not been conveyed to a Native Corporation, unless any such selection is determined to be invalid or is relinquished; and

> (C) lands referred to in section 19(b) of the Alaska Native Claims Settlement Act [43 U.S.C. 1618(b)].

16 U.S.C. § 3102(3). Correspondingly, "[t]he term 'Federal land' means lands the title to which is in the United States after December 2, 1980." 16 U.S.C. § 3102(2). Thus, under the first sentence in section 103(c), the only lands within the mapped boundaries of CSUs that are actually "deemed to be included as a portion of such unit," are lands whose title is in the United States after December 2, 1980, expressly excepting certain lands referred to and selected under ANCSA and certain State of Alaska lands and land selections.

The second sentence in section 103(c) provides: "No lands which, before, on, or after December 2, 1980, are conveyed to the State, to any Native Corporation, or to any private party shall be subject to the regulations applicable solely to public lands within such units." A "cardinal principle of interpretation" requires courts to "give effect, if possible, to every clause and word of a statute." *Loughrin v. United States*, 134 S. Ct. 2384, 2390 (2014). And it is likewise axiomatic that "when the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 711 n.9 (2004).

Given these principles, the first clause in section 103(c)'s second sentence requires attention—"[n]o lands which, before, on, or after December 2, 1980, are conveyed to the State, to any Native Corporation, or to any private party"—and cannot simply be glossed over and ignored as the Ninth Circuit did here. *See* Pet.

App. 23a-25a. Notably, this first clause does not simply refer to "nonpublic lands" but instead sweeps broadly and expressly delineates those lands that are to be treated as nonpublic. It does so by being more expansive as to time than the definitions of "public land" and "Federal land," referring to lands "*before, on, or after December 2, 1980*," rather than only lands "after December 2, 1980." *Compare* 16 U.S.C. § 3103(c), *with* § 3102(2)-(3). Viewed in context, section 103(c)'s second sentence makes explicit that lands "conveyed to the State, to any Native Corporation, or to any private party" *at any time* are not "subject to the regulations applicable solely to public lands within such units." These lands fall within the class that, under section 103(c)'s first sentence, is *not* "public land[]" and indeed is not even "deemed to be included as a portion of such unit." As such, these lands underwent no "change in land management status effected by this Act." *See* 16 U.S.C. § 3103(b). They are not subject to NPS's regulatory authority.

In this context, the meaning of the word "solely" becomes clear. "Solely" was included to differentiate between federal NPS regulations applicable *solely* on "public lands"—the only lands deemed to be part of the newly established units—and federal regulations applicable to public and private lands alike, such as those under the Clean Air Act or the Water Pollution Control Act. If the word "solely" were omitted and section 103(c) instead provided that no State, Native Corporation, or private lands "shall be subject to the regulations applicable to public lands within such units," the section would exempt those lands from EPA-regulated acts like the Clean Air Act and Water Pollution Control Act. "Solely" was inserted to make

clear that although the newfound authority granted to NPS over "public lands" in CSUs does not extend to State and private land, other preexisting federal authority over those lands remained.

Consistent with the first two sentences, the third sentence of section 103(c) addresses what occurs if such land is conveyed to the Secretary of the Interior: "If the State, a Native Corporation, or other owner desires to convey any such lands, the Secretary may acquire such lands in accordance with applicable law (including this Act), and any such lands shall become part of the unit, and be administered accordingly." This sentence reinforces the plain meaning of the first two sentences summarized above. Only upon conveyance to the Secretary do "such lands . . . become part of the unit, and be administered accordingly." But while such lands are held by a Native Corporation (or the State or other private owner), they are *not* part of the CSU, and are *not* subject to NPS administrative authority.

B. The Structure and Context of ANILCA as a Whole Reinforce the Plain Meaning of Section 103(c).

Examining the broader purpose, context, and structure of the Act confirms this interpretation—that only "public lands" are part of CSUs and thus subject to NPS regulation, while all lands conveyed to Native Corporations (as well as to the State and private parties) are not part of CSUs and are thus not subject to NPS regulation. Congress's purpose behind the Act was two-fold. On the one hand, it was "the intent of Congress in this Act to preserve unrivaled scenic and geological values associated with natural landscapes," as well as maintain wildlife and preserve wilderness

resource values and recreational opportunities. 16 U.S.C. § 3101(b). And on the other, it was "further the intent and purpose of this Act . . . to provide the opportunity for rural residents engaged in a subsistence way of life to continue to do so." 16 U.S.C. § 3101(c).

Critically, Congress was clear that it intended to advance these purposes through the regulation of "public lands" and establishment of conservation system "units." The very first provision in the Act makes this evident: "In order to preserve for the benefit, use, education, and inspiration of present and future generations certain lands and waters in the State of Alaska . . . *the units described in the following titles are hereby established*," *i.e.*, the CSUs. 16 U.S.C. § 3101(a) (emphasis added). Congress's statement of purpose also made clear that the Act obviated the need for future legislation:

> This Act provides sufficient protection for the national interest in the scenic, natural, cultural and environmental values *on the public lands* in Alaska, and at the same time provides adequate opportunity for satisfaction of the economic and social needs of the State of Alaska and its people; accordingly, *the designation and disposition of the public lands in Alaska pursuant to this Act* are found to represent a proper balance between the reservation of national conversation system units and *those public lands* necessary and appropriate for more intensive use and disposition, and thus Congress believes that the need for future legislation designating new conservation system units, new

> national conservation areas, or new national recreation areas, has been obviated thereby.

16 U.S.C. § 3101(d) (emphasis added).

Congress also made apparent its intent to limit regulation to "public lands" through its finding and declaration regarding subsistence management and use. There, Congress "invoke[d] its constitutional authority over Native affairs and its constitutional authority under the property clause and the commerce clause to protect and provide the opportunity for continued subsistence uses *on the public lands* by Native and non-Native rural residents." 16 U.S.C. § 3111(4). Congress likewise highlighted that the national interest "require[s] that an administrative structure be established for the purpose of enabling rural residents who have personal knowledge of local conditions and requirements to have a meaningful role in the management of fish and wildlife and of subsistence uses *on the public lands in Alaska*." 16 U.S.C. § 3111(5) (emphasis added).

Congress's emphasis upon cooperative agreements further bolsters its intention that NPS would not have direct regulatory authority over Native Corporation, State, or private lands located within the geographical boundaries of CSUs. The statement of policy in section 802 of the Act, for example, made clear that Congress's policy interest concerned "the public lands of Alaska," requiring that "Federal land managing agencies . . . shall cooperate with adjacent landowners and land managers, including Native Corporations, appropriate State and Federal agencies, and other nations," while making clear that Congress's emphasis was on "the

public lands in Alaska." 16 U.S.C. § 3112; *see also* ANILCA § 304(f)(1) (authorizing Secretary to enter into cooperative management agreements in national wildlife refuges).

The purpose, structure, and context of the Act further confirm that Congress intended section 103(c) to exclude nonpublic lands from *all* NPS regulation, not just regulations specific to Alaska CSUs. Notably, the next section in ANILCA after section 103(c) established new "areas" "as units of the National Park System," to be administered under both the *general* laws governing National Parks, as well as those *specific* to the CSUs under ANILCA. ANILCA § 201 ("The following areas are hereby established as units of the National Park System and shall be administered by the Secretary under the laws governing the administration of such lands and under the provisions of this Act . . . ."). Being excepted from inclusion as part of those newly established units, as is the case for lands conveyed to Native Corporations, the State, and private parties, necessarily means that section 201 does not apply to those lands. Correspondingly, those lands are then excepted from both general and CSU-specific NPS regulations. The Ninth Circuit's contrary conclusion, that section 103(c) exempts non-federal land from only "*CSU-specific regulations*" promulgated by NPS, premised upon its narrow focus upon the word "*solely*," *see* Pet. App. 24a-25a, cannot be squared with the plain text of section 103(c), particularly when interpreted against this broader statutory backdrop of the Act as a whole.

C. The Legislative History Confirms this Plain Meaning.

Consultation of ANILCA's legislative history is hardly necessary to distill Congress's express intent that Native Corporation, State, and private party lands falling within the mapped boundaries of CSUs are not part of those units, and not subject to any NPS regulation. But the legislative history fully reinforces this meaning. *See Brown & Williamson Tobacco*, 529 U.S. at 146-47 (confirming Congress's expressed intent not to have the FDA regulate tobacco by observing that "there is no evidence in the text of FDCA or its legislative history that Congress in 1938 even considered the applicability of the Act to tobacco products"). To provide just one example, the Senate Report provides as follows:

> Those private lands, and those public lands owned by the State of Alaska or a subordinate political entity, are not to be construed as subject to the management regulations which may be adopted to manage and administer any national conservation system unit which is adjacent to, or surrounds, the private or non-Federal public lands. Federal laws and regulations of general applicability to both private and public lands, such as the Clean Air Act, the Water Pollution Control Act, U.S. Army Corps of Engineers wetlands regulations, and other Federal statutes and regulations of general applicability would be applicable to private or non-Federal public land inholdings within conservations [sic] system units, and to such lands adjacent to conservation system

> units, and are thus unaffected by the passage of this bill.

S. Rep. No. 96-413, at 303 (1979), *as reprinted in* 1980 U.S.C.C.A.N. 5070, 5247. As this Report makes clear, it is only those federal laws "*unaffected by the passage of this bill*" that apply to non-federal lands within the mapped boundaries of a CSU. *See id.* Thus, as highlighted by the Senate Report, regulation by the EPA under the Clean Air Act and Water Pollution Control Act would still apply to those lands, as would U.S. Army Corps of Engineers regulations over wetlands. But what would not apply would be any regulation by NPS, whether general to all National Parks or specific to Alaska CSUs, because NPS's regulatory authority over CSUs is specifically created by virtue of the Act.

D. The Unambiguously Expressed Intent of Congress Forecloses NPS Regulation of Native Corporation, State, and Private Land Within CSUs.

For the reasons stated above, Congress unambiguously expressed its intent that Native Corporation, State, and private land located within the mapped boundaries of CSUs are not within such CSUs, and not subject to any of NPS's regulations. The NPS hovercraft regulation at issue here, as well as all other NPS regulations, are accordingly inapplicable and unenforceable on lands conveyed to Native Corporations, the State, or private parties.

III. NO CONSTITUTIONAL BASIS EXISTS FOR THE BROAD REGULATORY POWER THE NINTH CIRCUIT FOUND IN SECTION 103(c) OF ANILCA.

The constitutional avoidance canon of construction further reinforces the proper construction of section 103(c). NPS argued that its federal interest in navigable waters supports the hovercraft regulation. But the Ninth Circuit's ruling swept much further. Declining the government's invitation to rule based on a federal interest in navigable waters, the Court affirmed the district court's reading that section 103(c) supported regulation even if Alaska held full title to the navigable rivers within the parks, unencumbered by any federal interest in those rivers' waters. Pet. App. 55a-57a. This interpretation of section 103(c) far exceeds Congress's constitutional authority in many applications across most of the inholdings where the section applies.

As NPS recognizes, the Ninth Circuit opinion does not "resolve the constitutional avoidance arguments that might be made concerning construction of [federal] statutes, if NPS sought to regulate not navigable waters, but private inholdings." U.S. Cert. Opp. 22. The breadth of the Ninth Circuit's ruling, however, requires consideration of the constitutional issues implicated here.

As the United States has recognized, "[a]ny such regulation would have to rest on a grant of regulatory power." *Id.* The National Park Service Organic Act gives NPS authority to "[p]romulgate and enforce regulations concerning boating and other activities on or relating to waters located within areas of the

National Park System, *including waters subject to the jurisdiction of the United States*," so long as those regulations do not derogate the authority of the U.S. Coast Guard. 16 U.S.C. § 1a-2(h) (emphasis added). Acting under those authorities, NPS has adopted regulations that apply to federally owned lands and waters in the national parks, and to navigable waters within national parks, but that do not generally apply to privately held, State-held, or Native-held land within park boundaries. The NPS regulations apply within "[t]he boundaries of federally owned lands and waters administered by the National Park Service," and within the "[w]aters subject to the jurisdiction of the United States located within the boundaries of the National Park System, including navigable waters . . . without regard to the ownership of submerged lands, tidelands, or lowlands." 36 C.F.R. § 1.2(a)(1), (3). In contrast, the regulations expressly state that they do not generally apply on "non-federally owned lands and waters or on Indian tribal trust lands located within National Park System boundaries." 36 C.F.R. § 1.2(b). To put it bluntly, NPS has never before interpreted its powers to allow NPS regulation of all Native Corporation, State, or other non-federal lands within CSU boundaries.

Any newfound regulatory authority in section 103(c) must have a foundation in Congress's powers under the Constitution. Possible sources for such a power are the Property Clause and the Commerce Clause. But neither clause confers the breadth of legislative authority that would be required to support the Ninth Circuit's broad grant of regulatory power over private land.

The Property Clause is the source of broad regulatory power over *federal* lands, including conservation system units: "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. Const. art. IV, § 3, cl. 2. Under the Property Clause, "[t]he power over the public land thus entrusted to Congress is without limitations." *Kleppe v. New Mexico*, 426 U.S. 529, 539 (1976) (alteration in original). This Court has reiterated the "obvious" point that the "Property Clause is a grant of power only over federal property"; it does not generally reach private land. *Id.* at 537-38.[7]

Although this Court has not considered the issue, some circuits have held that the Property Clause supports limited regulation of non-federal lands to the extent necessary to protect the federal lands.[8] But no

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[7] *See also Kansas v. Colorado*, 206 U.S. 46, 89, 93 (1907) ("But clearly [the Property Clause] does not grant to Congress any legislative control over the states, and must, so far as they are concerned, be limited to authority over the property belonging to the United States within their limits.").

[8] *Free Enter. Canoe Renters Ass'n of Mo. v. Watt*, 711 F.2d 852, 855-56 (8th Cir. 1983) (upholding permit requirement for canoe rental business located on state or county lands to regulate how many canoes were used in Ozark National Scenic Riverways); *United States v. Lindsey*, 595 F.2d 5, 6 (9th Cir. 1979) (holding that the Property Clause "grants to the United States power to regulate conduct on non-federal land when reasonably necessary to protect adjacent federal property or navigable waters," and may require fire permits for campfires on State-owned river beds). For an example of such a regulation, see 36 C.F.R. § 2.13 (applying fire regulations to lands within park boundaries "regardless of land ownership" so long as the lands are "under the legislative jurisdiction of the United States").

court has held that the Property Clause supports general regulation of large swaths of non-federal lands absent a showing that the specific regulation is necessary for the protection of federal lands. Congress has no Constitutional authority under the Property Clause to extend broad general regulations—or even narrow regulations unrelated to protection of federal lands—to millions of acres of State and Native Corporation lands.

Ducking this constitutional problem, the Ninth Circuit cited Congress's "pre-eminent authority" under the Commerce Clause to regulate "the flow of navigable waters," where John Sturgeon operated his hovercraft. *Sturgeon v. Masica*, 768 F.3d 1066, 1081 (9th Cir. 2014) (quoting *New England Power Co. v. New Hampshire*, 455 U.S. 331, 338 n.6 (1982)). Similarly, NPS argues only that "the United States retain[s] 'a dominant servitude' in navigable waters, grounded in the Commerce Clause," and "has reserved water rights in many navigable rivers within parks—including the waters at issue here." U.S. Cert. Opp. at 15.

But the Ninth Circuit's decision is not limited to federal interests in navigable waters. Rather, section 103(c) and NPS regulation of Native Corporation, State, and private party land implicate the constitutional issues expressly recognized by the United States. *See* U.S. Cert. Opp. 22. These concerns cannot be ignored (as the Ninth Circuit did, and the United States urges the Court to do here) simply because this suit addresses a hovercraft regulation that could implicate some undefined and nonspecific federal interest in navigable waters.

Rather, as this Court has emphasized, "when deciding which of two plausible statutory constructions to adopt,[9] a court must consider the necessary consequences of its choice. If one of them would raise a multitude of constitutional problems, the other should prevail—whether or not those constitutional problems pertain to the particular litigant before the Court." *Clark v. Martinez*, 543 U.S. 371, 380-81 (2005) (footnote added). In other words, "[t]he lowest common denominator, as it were, must govern." *Id.* at 380. Here, "the lowest common denominator" dictates that section 103(c) must be construed as foreclosing any regulation (whether general or specific to the CPU) applicable to the "public lands" within a CSU by virtue of ANILCA's enactment, from being applied to Native corporation, State, or private lands.

Congress expressly confirmed the constitutional source of its power in its "Congressional declaration of findings" regarding "Subsistence Management and Use" in section 801 of ANILCA, recognizing that "it is necessary for the Congress to invoke its constitutional authority over Native affairs and its constitutional authority under the property clause and the commerce clause to protect and provide the opportunity for continued subsistence uses *on the public lands* by Native and non-Native rural residents." 16 U.S.C. § 3111(4) (emphasis added). Critically, however, Congress invoked its authority over Native affairs, and

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[9] For the reasons stated above, the statute is unambiguous and can be read only as a limit of federal power as argued by Petitioner and *amici*. Although this canon of construction is generally invoked when choosing between two plausible readings of an ambiguous statute, the principle also reinforces the plain meaning here.

under the Property and Commerce clauses, only with respect to regulations "*on the public lands*." And by the very terms of the Act, the "public lands" *excluded* lands conveyed to Native Corporations and to the State. It would thus be incongruous with the Act itself and Congress's constitutional powers for section 103(c) to be interpreted to *expand* the government's regulatory reach over inholdings owned by Native corporations or the State, which ANILCA makes clear are *not* "deemed to be included as a portion of such [conservation system] unit."

This constitutional problem with the Ninth Circuit's interpretation cannot be simply brushed aside by finding a Commerce Clause basis for reading the statute as applied to Sturgeon or the facts of this case. As this Court made clear in *Clark*, 543 U.S. at 381, interpreting a statute differently in a facial versus an as-applied constitutional challenge "misconceives—and fundamentally so—the role played by the canon of constitutional avoidance in statutory interpretation." This Court has emphasized that "the meaning of words in a statute cannot change with the statute's application." *United States v. Santos*, 553 U.S. 507, 522 (2008) (citing *Clark*, 543 U.S. at 378).

Even if hovercraft could constitutionally be excluded from the State's navigable waters, the Ninth Circuit was required to consider the absence of any constitutional basis for enforcing many general regulations across inholdings. For example, NPS regulates a broad array of activities including public assembly and meetings, the leashing of pets, and many others where regulation on private land would be unsupportable by Congress's commerce power.

To avoid this obvious issue with the Ninth Circuit's ruling, NPS attempts to recharacterize the Ninth Circuit's ruling as far more limited than it is. But both the district court and Ninth Circuit rejected the federal government's alternative arguments based on a federal interest in navigable waters sufficient to affirm the application of the hovercraft regulation at issue in Petitioner's case. At the district court level, the federal government failed to articulate any relationship between a federal interest in the subject waters and the hovercraft regulation at issue here. To avoid the thorny and difficult legal issue of the competing and conflicting state and federal interests in navigable waters, the district court adopted an untenable interpretation of section 103(c). Though that interpretation is both unconstitutional and contrary to long-standing agency understanding of agency power, the Ninth Circuit affirmed it. The decision cannot stand.

Section 103(c)'s language unambiguously clarifies that Congress had no intent to grant broad, general regulatory authority over inholdings. The Ninth Circuit ignored this Court's direction that it must consider the wide array of unconstitutional results flowing from its preferred interpretation of section 103(c). Interpreting the statute in accordance with its plain meaning raises no constitutional concerns. The doctrine of constitutional avoidance reinforces what the plain text of section 103(c) and its surrounding structure and purpose make clear—NPS regulations (whether of general applicability or specific to Alaska CSUs) do not apply to any Native corporation lands in Alaska.

CONCLUSION

The Ninth Circuit incorrectly interpreted the plain language in section 103(c) of ANILCA to expand federal authority over non-federal inholdings, including millions of acres of lands owned by Native corporation *amici*. But the plain language unambiguously limits federal authority to public lands, consistent with the constitutional authority underpinning ANILCA. This reading is confirmed by long-standing NPS regulations confirming that such regulations generally do not apply on "non-federally owned lands and waters or on Indian tribal trust lands located within National Park System boundaries." 36 C.F.R. § 1.2(b). The Ninth Circuit's decision must be reversed so that Native corporations and their shareholders remain free to pursue economic development and subsistence activity—as well as ordinary day-to-day life in Native villages—without pervasive federal government regulatory intervention. *Amici* ASRC, CIRI, and SNAI, join John Sturgeon, the State of Alaska, and the other Alaska Native Corporation *amici* in urging this Court to reverse the Ninth Circuit's decision.

Respectfully submitted,

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In The Supreme Court of the United States

JOHN STURGEON,

Petitioner,

v.

SUE MASICA, IN HER OFFICIAL CAPACITY AS ALASKA REGIONAL DIRECTOR OF THE NATIONAL PARK SERVICE, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF ARCTIC SLOPE REGIONAL CORPORATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTERESTS OF THE *AMICUS CURIAE*	1
REASONS FOR GRANTING THE PETITION	2
I. The Ninth Circuit's Unprecedented Reading of ANILCA Section 103(c) Extends Federal Regulatory Authority Over Millions of Acres of Native Corporation Lands	4
A. Land Ownership in Alaska	4
B. ASRC's Lands	8
II. This Case Presents an Important Federal Question Affecting ASRC and its Shareholders, Other Native Corporations, and the State of Alaska	13
A. Enforcement of CSU regulations on ANCSA Corporation inholdings will dramatically impact economic development and day-to-day life on Native Corporation lands	13
B. Section 103(c) of ANILCA confirms that federal regulatory authority does not reach private and State land inholdings surrounded by federal conservation units	16
C. No constitutional basis exists for the broad regulatory power the Ninth Circuit found in section 103(c) of ANILCA	20
CONCLUSION	25

TABLE OF CONTENTS – Continued

Page

APPENDIX

Department of the Interior – Alaska Land Status Map ..... App. 1

TABLE OF AUTHORITIES

Page

CASES

Alaska v. Babbitt, 72 F.3d 698 (9th Cir. 1995).....22

City of Angoon v. Marsh, 749 F.2d 1413 (9th Cir. 1984).....17, 18

City of Saint Paul v. Evans, 344 F.3d 1029 (9th Cir. 2003).....6

Clark v. Martinez, 543 U.S. 371 (2005).....4, 20

Free Enter. Canoe Renters Ass'n of Mo. v. Watt, 711 F.2d 852 (8th Cir. 1983).....21

Kansas v. Colorado, 206 U.S. 46 (1907).....21

Kleppe v. New Mexico, 426 U.S. 529 (1976).....4, 21

Nevada v. Watkins, 914 F.2d 1545 (9th Cir. 1990).....21

New England Power Co. v. New Hampshire, 455 U.S. 331 (1982).....22

Sturgeon v. Masica, 768 F.3d 1066 (9th Cir. 2014).....22

Trs. for Alaska v. State, 736 P.2d 324 (Alaska 1987).....5

United States v. Lindsey, 595 F.2d 5 (9th Cir. 1979).....21

United States v. Santos, 553 U.S. 507 (2008).....20, 23

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS

Property Clause, U.S. Const. art. IV, § 3, cl. 2 ....20, 21

Commerce Clause, U.S. Const. art. I, § 8, cl. 3....20, 23

STATUTES

Alaska Native Claims Settlement Act of 1971 ("ANCSA"), Pub. L. No. 92-203, 85 Stat. 688 (codified at 43 U.S.C. § 1601, *et seq.*) .....*passim*

ANCSA § 2(a), 43 U.S.C. § 1601(a) 6

ANCSA § 7, 43 U.S.C. § 1606 .....6, 8

ANCSA § 8, 43 U.S.C. § 1607 6

ANCSA § 12, 43 U.S.C. § 1611 6

ANCSA § 14, 43 U.S.C. § 1613 6

ANCSA § 22(g), 43 U.S.C. § 1621(g) 9

Alaska National Interest Lands Conservation Act of 1980 ("ANILCA"), Pub. L. No. 96-487, 94 Stat. 2371 (codified at 16 U.S.C. § 3101, *et seq.*).....*passim*

ANILCA § 102(3), 16 U.S.C. § 3102(3).....18

ANILCA § 103(c), 16 U.S.C. § 3103(c) .....*passim*

ANILCA § 303(2), 94 Stat. 2371, 2390.....9

ANILCA § 1002, 16 U.S.C. § 3142 9

ANILCA § 1003, 16 U.S.C. § 3143 9

TABLE OF AUTHORITIES – Continued

Page

Alaska Statehood Act, Pub. L. No. 85-508, 72 Stat. 339 (1958), *reprinted in* 48 U.S.C. ch. 2, refs. & annots., as amended 5

OTHER AUTHORITIES

S. Rep. No. 96-413, at 303 (1979), *reprinted in* 1980 U.S.C.C.A.N. 5070.....19

36 C.F.R. § 1.4(a).....14

36 C.F.R. § 2.1.....14

36 C.F.R. § 2.2.....14

36 C.F.R. § 2.3.....14

36 C.F.R. § 2.5.....14

36 C.F.R. § 2.10.....14, 15

36 C.F.R. § 2.13.....21

36 C.F.R. § 2.17.....14

36 C.F.R. § 2.18.....14

36 C.F.R. § 2.50.....14

36 C.F.R. § 2.51.....14

36 C.F.R. § 2.52.....14

36 C.F.R. § 3.8.....14

36 C.F.R. § 4.10.....14

36 C.F.R. § 4.30.....14

36 C.F.R. § 5.3.....14

36 C.F.R. § 5.7.....14

TABLE OF AUTHORITIES – Continued

Page

36 C.F.R. § 13.25 15

36 C.F.R. § 13.160 14

36 C.F.R. § 13.410 14

INTERESTS OF THE *AMICUS CURIAE*

Arctic Slope Regional Corporation ("ASRC") submits this brief as *amicus curiae* in support of John Sturgeon's petition for a writ of certiorari in *Sturgeon v. Masica* (No. 14-1209).[1] ASRC is one of twelve private, for-profit Alaska Native Regional Corporations formed in 1971 under the Alaska Native Claims Settlement Act of 1971 ("ANCSA"), Pub. L. No. 92-203, 85 Stat. 688 (codified at 43 U.S.C. § 1601, *et seq.*). Alaska's largest locally owned business, ASRC is owned by 12,000 Iñupiat Eskimo shareholders. ASRC and its subsidiaries operate in thirty-six states and internationally, employing more than 10,000 people and generating over $2.5 billion in annual revenue.

ASRC holds title to nearly five million acres of land on Alaska's North Slope granted to it pursuant to ANCSA. More than 380,000 of these acres are "inholdings" situated within the Gates of the Arctic National Park, the Alaska Maritime National Wildlife Refuge, and the Arctic National Wildlife Refuge. All of these are federal conservation system units ("CSUs") created or expanded by the Alaska National Interest Lands Conservation Act of 1980 ("ANILCA"), Pub. L.

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[1] In accord with Supreme Court Rule 37.6, ASRC affirms that no counsel for a party authored this brief in whole or in part, and no such counsel or a party made a monetary contribution intended to fund the preparation or submission of this brief. Counsel of record for all parties received timely notice of ASRC's intention to file this brief, and consent to file was granted by all parties. Letters reflecting the parties' consent to the filing of this brief have been filed with the Clerk.

No. 96-487, 94 Stat. 2371 (codified at 16 U.S.C. § 3101, *et seq.*). ASRC's lands, including its inholdings within federal CSU's, have high potential for oil and gas development, other mineral development, tourism, and other economic uses. These acres are also critically important to ASRC's shareholder communities for village use and subsistence fishing and hunting. Many ASRC shareholders reside in two villages located on its inholdings within CSUs.

Through ANILCA, Congress balanced the conservation interests of the federal government with the economic development and subsistence interests of ANCSA corporations like ASRC. The Ninth Circuit expanded federal regulatory authority over Native Corporations' lands through a contorted misreading of the very provision in ANILCA meant to limit that authority. This ruling dramatically upsets the balance Congress struck in ANILCA, undermining the purpose of ANCSA to the great detriment of ASRC's shareholders and those of its fellow Native corporations.[2]

REASONS FOR GRANTING THE PETITION

The Ninth Circuit's decision reaches far beyond one hunter and one hovercraft on navigable waters

[2] Other Native corporations and the State of Alaska have also filed as *amici* in support of Mr. Sturgeon's petition. ASRC fully agrees with the arguments put forth by its fellow *amici*.

of the State. Its reading of ANILCA section 103(c), 16 U.S.C. § 3103(c), affects private land ownership rights on millions of acres in Alaska. Most importantly to *amicus*, the Ninth Circuit's ruling threatens the economic development and subsistence rights of thousands of Alaska Native Corporation shareholders on their privately-held ANCSA lands within ANILCA-created federal conservation system units.

The Ninth Circuit found in section 103(c) of ANILCA a new source of far-reaching federal regulatory authority over State and private lands. But section 103(c) is not a grant of federal regulatory authority. In order to protect the economic and use value of private and State lands, the statutory provision plainly limits that authority to "public lands" of the United States. Congress added the provision to reassure the State of Alaska and the Alaska Native Corporations that their lands, which became inholdings upon the passage of ANILCA, would be free of federal CSU regulations. The Ninth Circuit's ruling invalidates that provision, granting the federal government power to effectively appropriate into the federal park system private lands granted to ANCSA corporations for economic purposes.

Section 103(c)'s meaning has not been, but should be, settled by this Court because of the dramatic negative impact the Ninth Circuit's decision will have on economic development, subsistence and transportation uses, and, with respect to State lands, the sovereign rights of Alaska's people over their land. Absent this Court's ruling, no court other than the

Ninth Circuit will ever answer this Alaska-specific statutory question. Certiorari should be granted for the additional reason that no constitutional source exists for the plenary regulatory authority the Ninth Circuit discovered in section 103(c). That court's reading therefore conflicts with relevant decisions of this Court, including *Kleppe v. New Mexico*, 426 U.S. 529 (1976) and *Clark v. Martinez*, 543 U.S. 371 (2005), among others. The Ninth Circuit's contorted reading leads to extensive unconstitutional results; the plain meaning of the statute – which the Ninth Circuit ignored – raises no such constitutional concerns.

I. The Ninth Circuit's Unprecedented Reading of ANILCA Section 103(c) Extends Federal Regulatory Authority Over Millions of Acres of Native Corporation Lands.

The Ninth Circuit held that under section 103(c) of ANILCA, federal CSU regulations of nationwide applicability extend to State and privately owned inholdings in Alaska's national parks and refuges. Eighteen million acres of land conveyed to Alaska Native Corporations under ANCSA are profoundly affected by this ruling.

A. Land Ownership in Alaska

Alaska's primary resource is its land. At 365.5 million acres, Alaska is more than twice as large as Texas. This vast terrain serves numerous local and national interests and goals, including economic

development, energy security, environmental conservation, and subsistence use. In service of these goals, Congress has divided Alaska among three primary landowners: the federal government, the State itself, and the Alaska Native Corporations. These three together hold over 99 percent of the land in Alaska. Less than one percent of the state is held in traditional private ownership.[3]

The State of Alaska itself is its own second-largest landowner, behind the federal government. The Alaska Statehood Act granted the new state ownership of twenty-eight percent of its total area in order to "ensure the economic and social well-being of the new state."[4] Land owned by the State of Alaska approximates the State of California in size.[5]

The Alaska Statehood Act reserved the issue of aboriginal land claimed by Alaska's indigenous people. Congress passed the Alaska Native Claims

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[3] The map at App. 1, prepared by the Department of the Interior, shows the State, Native Corporation, and different categories of federal government lands in Alaska. This map is also available at http://www.asrc.com/lands/Pages/alaska%20maps.aspx.

[4] Alaska Statehood Act, Pub. L. No. 85-508, 72 Stat. 339 (1958), *reprinted in* 48 U.S.C. ch. 2, refs. & annots., as amended; *Trs. for Alaska v. State*, 736 P.2d 324, 335 (Alaska 1987) (explaining that Congress's debates show it "recognized the financial burden awaiting the new state" and that "the large statehood land grant and the grant of the underlying mineral estate were seen as important means by which the new state could meet that burden.").

[5] The Appendix map shows State lands in dark blue.

Settlement Act ("ANCSA") in 1971 to address the "need for a fair and just settlement of all claims by Natives and Native groups of Alaska, based on aboriginal land claims." ANCSA § 2(a), 43 U.S.C. § 1601(a). ANCSA created twelve regional corporations and more than 200 village corporations, and made Alaska's Native people shareholders in those corporations. ANCSA §§ 7-8, 43 U.S.C. §§ 1606-1607. ASRC is the Alaska Native Regional Corporation for Alaska's North Slope region.

ANCSA called for conveyance of approximately 44 million acres of federal land to Alaska Native regional and village corporations, making the Native Corporations, as a group, the third-largest landowner in the State. *See* ANCSA §§ 12, 14, 43 U.S.C. §§ 1611, 1613.[6] Congress intended the Native Corporations to use their ANCSA lands largely for economic development benefiting the Native people of Alaska. *See* ANCSA § 8, 43 U.S.C. § 1607; *City of Saint Paul v. Evans*, 344 F.3d 1029, 1031 (9th Cir. 2003).

Even after transferring these extensive lands to the State and to Native Corporations, the federal government remains the largest landowner in Alaska. The federal government's share is 222 million acres, over sixty percent of the land in the state. Federal acreage in Alaska is larger than Texas and Oklahoma together. It covers more territory than Maine, New

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[6] The Native Corporations' lands are shown on the Appendix map in brown.

Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut, New York, New Jersey, Pennsylvania, Ohio, Delaware, Maryland, Virginia, North Carolina, and South Carolina combined. The regulatory influence of the federal government and its relationship to other Alaska landowners thus has extraordinary importance in the state.

Over 120 million of Alaska's federally owned acres are protected within federal conservation system units, or CSUs. These include 15 national parks, preserves, and monuments managed by the National Park Service and 16 national wildlife refuges managed by the United States Fish and Wildlife Service.[7] Most of these CSUs were created or expanded by ANILCA in 1980. By that time, however, the Native Corporations had received most of the lands promised to them under ANCSA to ensure their economic security. Many of these previously conveyed lands fell within the boundaries of the newly created CSUs. At least several hundred private homestead sites were also engulfed by federal conservation lands under ANILCA.[8] ANILCA-created federal conservation units

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[7] The various categories of federal government lands are shown in different colors on the Appendix map. Lands managed by the National Park Service are light pink; lands in the National Wildlife Refuge System (managed by the United States Fish and Wildlife Service) are light blue.

[8] These private landowners are unlikely to muster the resources to make themselves heard in this Court, but their interests are markedly affected by the Ninth Circuit's ruling as well.

ultimately engulfed over eighteen million acres of ANCSA Corporation-owned land – vast islands of private land within CSUs. Eleven of Alaska's twelve regional corporations and many of its over 200 village corporations own inholdings within ANILCA CSUs. These eighteen million acres of ANCSA inholdings – over forty percent of all ANCSA lands – are now potentially subject to federal CSU regulations under the Ninth Circuit's decision.

B. ASRC's Lands

ASRC owns five million acres of ANCSA land in the northernmost part of the state, known as the "North Slope" of the Brooks Mountain Range. Its shareholders live primarily in eight extremely remote arctic villages in one of the most isolated and challenging environments in the world. In this harsh and roadless region, they continue to rely on the same subsistence food sources as their ancestors. The health of caribou herds, fish, water fowl, Dall sheep, musk oxen, marine mammals, and other subsistence food populations are critically important to ASRC's people. ASRC's land is located around its villages, in key locations for subsistence hunting and fishing, and in sites with high potential for oil, gas, and other development of subsurface resources. The land wealth held by ASRC benefits not only its own shareholders, but Alaska Native people statewide through the revenue sharing provisions of ANCSA. ANCSA § 7(i)-(j), 43 U.S.C. § 1606(i)-(j).

ASRC's land holdings intersect with three federal CSUs. Gates of the Arctic National Park, which itself covers an area larger than Massachusetts, surrounds the Iñupiat village of Anaktuvuk Pass. ASRC owns almost 180,000 acres of land within Gates of the Arctic, including lands around the village itself as well as a separate parcel at Itkillik Lake. ASRC's inholdings within Gates of the Arctic are four times the size of the District of Columbia and over twice the size of Utah's Arches National Park. These inholdings have value for tourism and natural gas development, in addition to their critical subsistence hunting and fishing uses.

Kaktovik, another ASRC village, is located on the coastal plain within the Arctic National Wildlife Refuge ("ANWR"). At nearly two million acres, ANWR is twice as large as Maryland and Delaware combined. ASRC owns more than 100,000 acres of inholdings in ANWR, primarily around the coastal village of Kaktovik but also at Elusive Lake. Elusive Lake has potential for development as a tourism fishing lodge. The lands surrounding Kaktovik are used for village and subsistence purposes and have economic potential for oil and gas development.[9]

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[9] As a former wildlife range predating ANILCA, ANWR is a special case under both ANCSA and ANILCA. *See, e.g.*, ANCSA § 22(g), 43 U.S.C. § 1621(g); ANILCA § 303(2), 94 Stat. 2371, 2390. Oil and gas development on these lands will require Congressional action. *See* ANILCA §§ 1002-1003, 16 U.S.C. §§ 3142-3143. Section 103(c) is therefore a single piece of a more complicated statutory

(Continued on following page)

The Alaska Maritime National Wildlife Refuge ("AMNWR") covers over two thousand islands, headlands, and other coastal features around Alaska's vast coastline. The two northernmost units of the refuge are located at Cape Thompson and Cape Lisburne, on the Chukchi Sea coast near the village of Point Hope. ASRC holds over 100,000 acres of inholdings in these two AMNWR units. Point Hope residents use these lands for subsistence, and they also have coal and other mineral resource potential.

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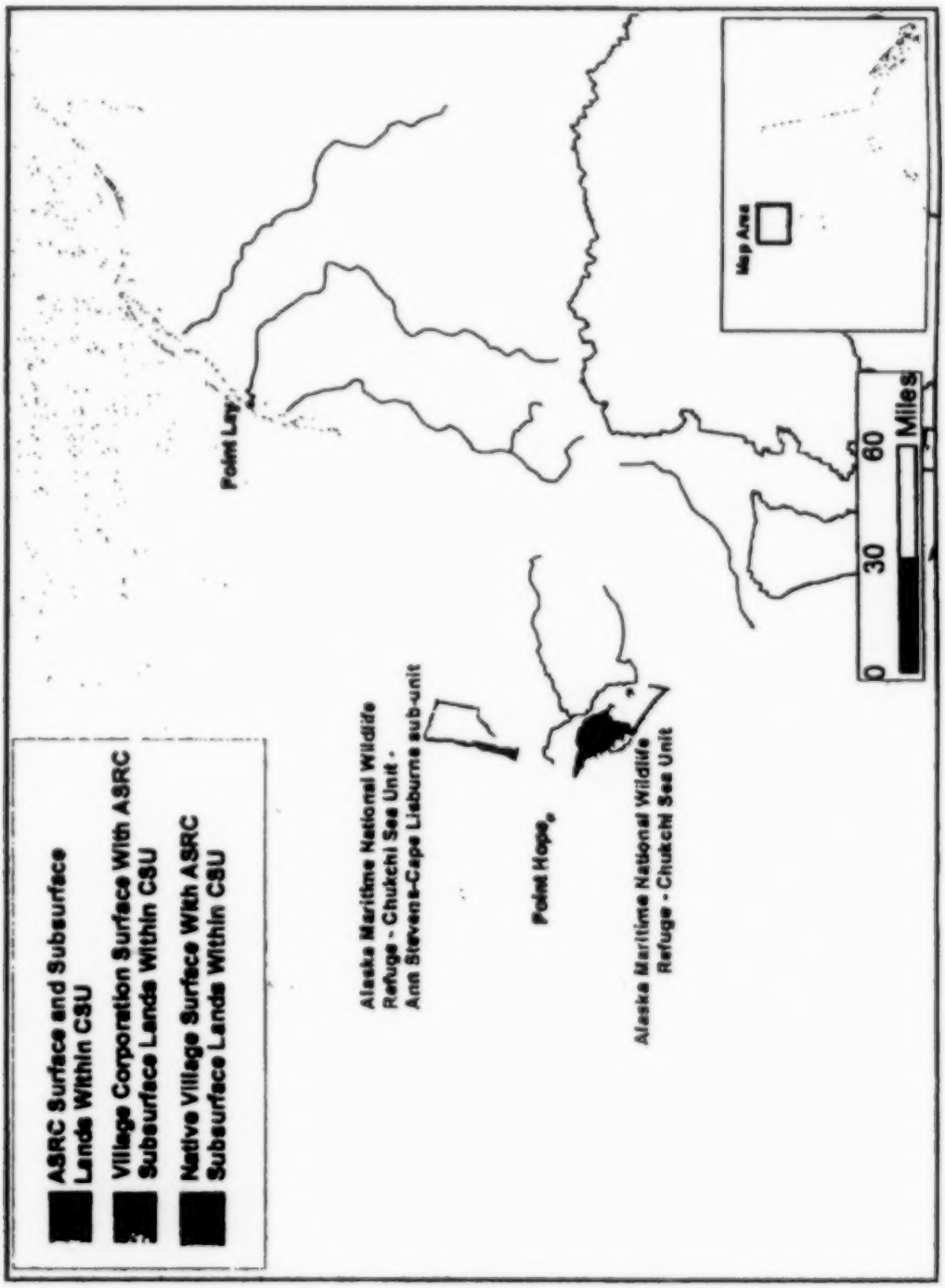
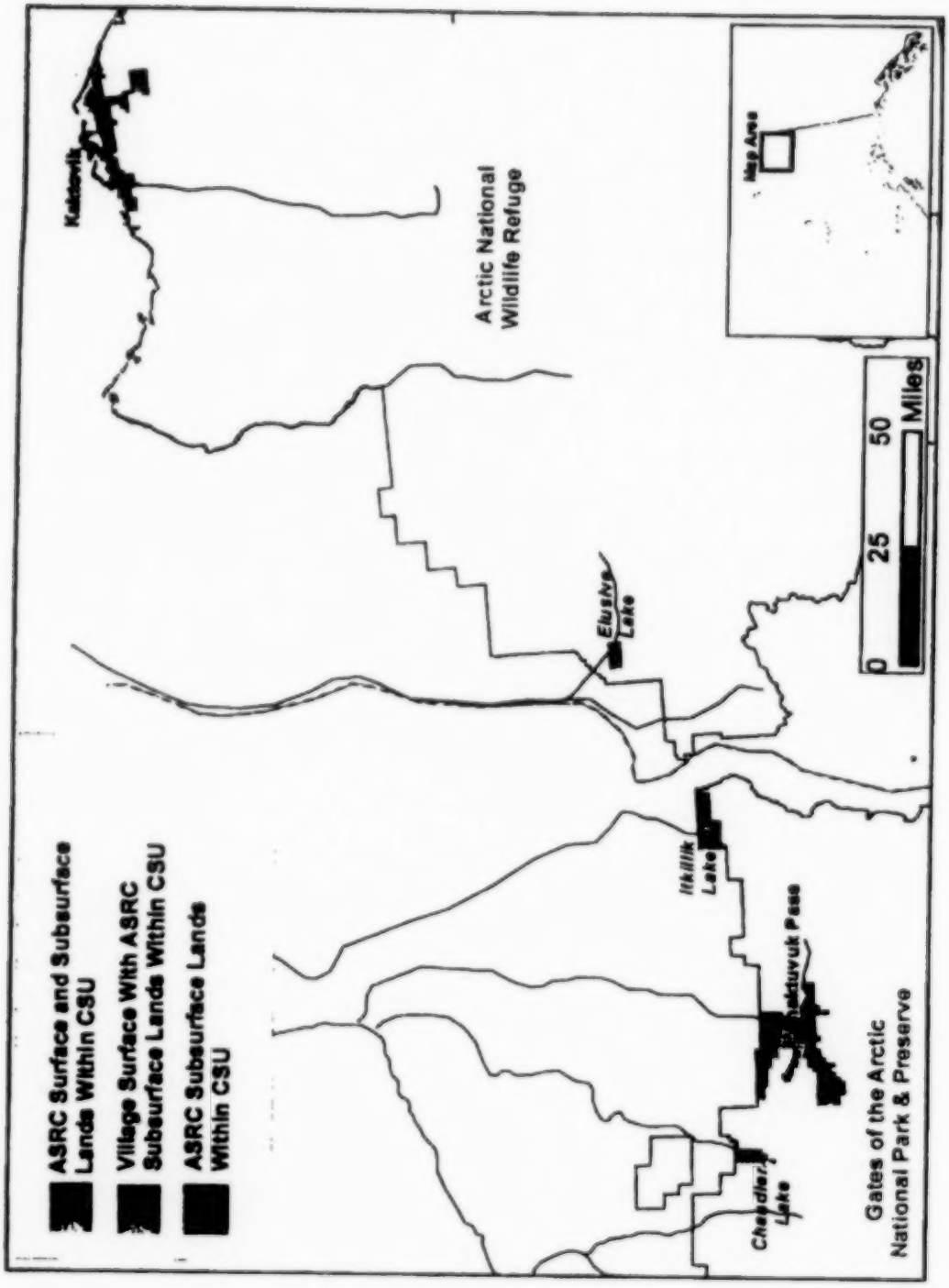
scheme on ASRC's inholdings within the refuge. Nevertheless, ASRC believes the meaning of section 103(c) of ANILCA has relevance to questions of federal regulatory authority on its privately owned lands within ANWR.


ASRC Surface and Subsurface Lands Within CSU
Village Corporation Surface With ASRC Subsurface Lands Within CSU
Native Village Surface With ASRC Subsurface Lands Within CSU
Point Lay
Alaska Maritime National Wildlife Refuge - Chukchi Sea Unit - Ann Stevens-Cape Lisburne sub-unit
Point Hope
Alaska Maritime National Wildlife Refuge - Chukchi Sea Unit
Map Area
0
30
60
Miles


ASRC Surface and Subsurface Lands Within CSU
Village Surface With ASRC Subsurface Lands Within CSU
ASRC Subsurface Lands Within CSU
Arctic National Wildlife Refuge
Kaktovik
Elusha Lake
Itkillik Lake
Chandler Lake
Gates of the Arctic National Park & Preserve
0
25
50
Miles

II. This Case Presents an Important Federal Question Affecting ASRC and its Shareholders, Other Native Corporations, and the State of Alaska.

This Court should grant certiorari in this case because federal regulatory authority over State and privately held inholdings is an issue of tremendous economic and social importance across Alaska. Given oil and natural gas development possibilities on some of the affected State and Native-owned lands, the decision also has potential nationwide consequences. In addition, this Court should act because the Ninth Circuit interpreted section 103(c) in a way that exceeds Congress's Constitutional authority in many applications across most of the inholdings where the section applies.

A. Enforcement of CSU regulations on ANCSA Corporation inholdings will dramatically impact economic development and day-to-day life on Native Corporation lands.

In national parks, human activity is intensely regulated for the purpose of protecting wildlife and the scenic wilderness character of the parks. Endless aspects of the use of the land are covered by the Code of Federal Regulations. According to the Ninth Circuit's reading of ANILCA, Congress intended that forty percent of private ANCSA lands would be subject to this vast regulatory scheme. Innumerable activities integral to economic and social life on inholdings

would fall within the regulatory ambit of the federal government.

The day-to-day consequences on private inholdings would be stunning. Buildings may not be constructed in national parks without advance approval from the federal government. 36 C.F.R. § 5.7. Hunting and fishing on park lands are subject to extensive restrictions and permitting requirements. *Id.* §§ 2.1(a)(1), 2.2, 2.3. Camping is limited to designated areas; levelling ground or altering a site to make it more suitable for camping is prohibited. *Id.* § 2.10. Even gathering berries requires written findings from a park superintendent. *Id.* § 2.1(c)(1).

Modes of transportation critical in rural Alaska, including snowmobiles, ATVs, watercraft, and even bicycles are all limited to locations approved by the park service. *Id.* §§ 1.4(a) (definitions of "vehicle" and "vessel"), 2.18, 3.8, 4.10, 4.30. Aircraft – another critical aspect of access to rural Alaska communities – may be used only in designated locations and by permit. *Id.* § 2.17. Commercial activities are circumscribed and regulated. *Id.* § 5.3. Research may be conducted only by specific institutions and agencies, and only under the regulatory watch of the park service. *Id.* § 2.5. Public meetings, demonstrations and distribution of printed materials all require permits and federal government oversight. *Id.* §§ 2.50, 2.51, 2.52.

The Ninth Circuit's ruling would prevent ANCSA shareholders from developing their lands for ecotourism, either in the form of lodges or even through

modest endeavors like providing basic trails, tent sites, and hiking permits to visitors. Indeed, buildings, trails, or roads of any kind could not be constructed on ANCSA inholdings, even in the villages themselves. Businesses in Native villages could be required to seek permits from federal agencies in order to do business.

The court's distinction between nationwide and Alaska-specific regulations, applying the former but not the latter on inholdings, leads to even more absurd results. Subsistence use is specifically permitted in many Alaska CSUs, including the use of subsistence cabins, *see, e.g.*, *id.* §§ 13.160, 13.410, but subsistence use is generally not allowed under the nationwide regulations. Applying the nationwide regulations on the inholdings, the National Park Service could forbid Native hunters from using their ATVs or snowmobiles to carry game back to the village. But on most Alaska National Parks themselves, less restrictive Alaska-specific park regulations often permit such travel. Under the nationwide regulations that the Ninth Circuit has applied on inholdings, camping is generally restricted to designated areas; in Alaska parks, it is generally allowed. *Compare id.* § 2.10 *with id.* § 13.25. Many more examples exist.

ANCSA lands were granted to Alaska's Native people so that they may freely live, work, and engage in subsistence activity and commerce there. And of course, part of Alaska's oil and other mineral wealth was specifically granted to ANCSA corporations in order to ensure the economic stability of Alaska's

Native people. Taking a vast federal regulatory regime aimed at public land conservation and enforcing it on private, ANCSA land undermines the purpose of ANCSA.

The government may argue that the National Park Service has no intention of stepping in to prohibit public meetings or commercial activity in villages like Anaktuvuk Pass. But the Ninth Circuit has ruled that in ANILCA, Congress granted federal agencies the authority to control all this and more on private land. The court's perversion of section 103(c) has wide ranging economic and social consequences for ASRC's shareholders, other ANCSA shareholders, and the rest of Alaska's people as well.

B. Section 103(c) of ANILCA confirms that federal regulatory authority does not reach private and State land inholdings surrounded by federal conservation units.

The legal issue in this case is straightforward: did section 103(c) of ANILCA extend federal conservation regulations to State and private inholdings? The statutory text and the legislative history both unambiguously confirm that the Ninth Circuit answered this question incorrectly.

In enacting ANILCA in 1980, Congress was well aware of the pre-existing land ownership rights of the State, ANCSA Corporations, and private landowners. The Ninth Circuit recognized thirty years ago that

"after the [1971] passage of ANCSA, Congress became aware of the need for a legislative means of maintaining the proper balance between the designation of national conservation areas and the necessary disposition of public lands for more intensive private use." *City of Angoon v. Marsh*, 749 F.2d 1413, 1415-16 (9th Cir. 1984). Congress carefully balanced the conservation goals underlying the creation of new parks and refuges under ANILCA against the critical "economic and social needs of the people of Alaska." *Id.* Section 103(c) confirmed that State, Native Corporation, and other private lands would not be subject to the federal regulations applicable to the federal conservation lands:

> Only those lands within the boundaries of any conservation system unit which are public lands (as such term is defined in this Act) shall be deemed to be included as a portion of such unit. *No lands which, before, on, or after December 2, 1980, are conveyed to the State, to any Native Corporation, or to any private party shall be subject to the regulations applicable solely to public lands within such units.* If the State, a Native Corporation, or other owner desires to convey any such lands, the Secretary may acquire such lands in accordance with applicable law (including this Act), and any such lands shall become part of the unit, and be administered accordingly.

16 U.S.C. § 3103(c) (emphasis added). The definition of "public lands" under the statute further clarifies

that CSUs include only "Federal lands," not State or Native Corporation lands. ANILCA § 102(3), 16 U.S.C. § 3102(3).

The Ninth Circuit misinterpreted ANILCA section 103(c) as a statutory expansion of federal power over private inholdings owned by the State and Native Corporations. Such power would not exist absent section 103(c). The statutory text makes clear that Congress instead intended the provision to confirm the *limit* on federal power.

The operative section 103(c) language states that "[n]o lands which . . . are conveyed to the State, to any Native Corporation, or to any private party shall be subject to the regulations applicable solely to public lands ["Federal lands"] within such units." The Ninth Circuit read this sentence to mean that State, Native Corporation, and private lands are exempt "solely" from regulations "within such units," meaning Alaska CSU-specific regulations. And thus, by finding inholdings exempt from Alaska regulations but not nationwide regulations, the Ninth Circuit converted a power limiting statute into a new source of general federal regulatory authority over private land.

In *City of Angoon v. Marsh*, the Ninth Circuit had recognized that the language in section 103(c) "specifically indicat[es] that private lands are not to be restricted by virtue of their location within the boundaries of a conservation system unit." 749 F.2d at 1418 n.5. Section 103(c) was not included in ANILCA as a

clandestine extension of nationwide federal park regulations across State and Native Corporation lands. Instead, Congress included the word "solely" in section 103(c) to make clear that State and private inholdings are not exempt from federal statutes and regulations applicable to private and public lands everywhere. As ANILCA's legislative history makes clear, these include the Clean Air Act or the Clean Water Act and similar generally applicable legislation:

> Federal laws and regulations of general applicability to both private and public lands, such as the Clean Air Act, the Water Pollution Control Act, U.S. Army Corps of Engineers wetland regulations and other Federal statutes of general applicability would be applicable to private or non-Federal public land in holdings within conservations [sic] system units, and to such lands adjacent to conservation system units, and thus are unaffected by the passage of the bill.

S. Rep. No. 96-413, at 303 (1979), *reprinted in* 1980 U.S.C.C.A.N. 5070, 5247.

In short, Mr. Sturgeon's reading of section 103(c) is correct. The plain meaning of the text, the legislative history, canons of statutory construction, and common sense all support his reading.

C. No constitutional basis exists for the broad regulatory power the Ninth Circuit found in section 103(c) of ANILCA.

The Ninth Circuit read the operative language in ANILCA section 103(c) to expand the National Park Service's general regulatory power over lands owned by the State and Alaska Native Corporations. This interpretation exceeds Congress's Constitutional authority in many applications across most of the inholdings where the section applies. The holding thus squarely conflicts with this Court's statutory interpretation directive in *Clark v. Martinez*, 543 U.S. 371 (2005) and *United States v. Santos*, 553 U.S. 507 (2008).

The newfound regulatory authority must have a foundation in Congress's powers under the Constitution. Possible sources for such a power are the Property Clause and the Commerce Clause. But neither clause confers the breadth of legislative authority that would be required under the Ninth Circuit's interpretation.

The Property Clause is the source of broad regulatory power over federal lands, including conservation system units: "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other property belonging to the United States." U.S. Const. art. IV, § 3, cl. 2. Under the Property Clause, "[t]he power over the public land thus entrusted to Congress is without

limitations." *Kleppe v. New Mexico*, 426 U.S. 529, 539 (1976) (internal quotation marks omitted).

This Court has reiterated the "obvious" point that the "Property Clause is a grant of power only over federal property"; it does not generally reach private land. *Id.* at 538-39.[10] Although this Court has not considered the issue, some circuits have held that the Property Clause supports limited regulation of non-federal lands to the extent necessary to protect the federal lands.[11] But no court has held that the Property Clause supports general regulation of non-

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[10] *Accord Nevada v. Watkins*, 914 F.2d 1545, 1553 (9th Cir. 1990) (noting "that the Property Clause was inapplicable [to State-owned waterways], because that clause was limited to authority over the property belonging to the United States within [the States'] limits and did not apply to state-owned river beds." (citing *Kansas v. Colorado*, 206 U.S. 46, 89, 93 (1907) ("But clearly [the Property Clause] does not grant to Congress any legislative control over the states, and must so far as they are concerned, be limited to authority over the property belonging to the United States with their limits."))).

[11] *United States v. Lindsey*, 595 F.2d 5, 6 (9th Cir. 1979) (holding that the Property Clause "grants to the United States power to regulate conduct on non-federal land when reasonably necessary to protect adjacent federal property or navigable waters," and may require fire permits for campfires on State-owned riverbeds); *Free Enter. Canoe Renters Ass'n of Mo. v. Watt*, 711 F.2d 852, 855-56 (8th Cir. 1983) (upholding permit requirement for canoe rental business located on state or county lands to regulate how many canoes were used in Ozark National Scenic Riverways). For an example of such a regulation, *see* 36 C.F.R. § 2.13 (applying fire regulations to lands within park boundaries "regardless of land ownership" so long as the lands are "under the legislative jurisdiction of the United States.").

federal lands absent a showing that the regulation is necessary for the protection of federal lands. Congress has no Constitutional authority under the Property Clause to extend broad general regulations – or even narrow regulations unrelated to protection of federal lands – to State and Native Corporation lands.

Ducking this problem, the Ninth Circuit cited Congress's "pre-eminent authority" under the Commerce Clause to regulate "the flow of navigable waters," where John Sturgeon operated his hovercraft. *Sturgeon v. Masica*, 768 F.3d 1066, 1081 (9th Cir. 2014) (quoting *New England Power Co. v. New Hampshire*, 455 U.S. 331, 338 n.6 (1982)). But the Ninth Circuit had already rejected the argument that Congress exercised its commerce power in ANILCA to grant the federal government general regulatory authority over navigable waters in Alaska. *Alaska v. Babbitt*, 72 F.3d 698, 703 (9th Cir. 1995). And in any event, the Ninth Circuit's interpretation of ANILCA section 103(c) is not limited to navigable waters.

The Ninth Circuit interprets section 103(c) to grant federal regulatory power over all State, Native Corporation, and private lands and waters (both navigable and unnavigable) within the boundaries of CSU's in Alaska. The court ignored the unconstitutional results its reading of the statute creates. The ruling therefore ran afoul of this Court's clear direction: statutes must be interpreted to avoid unconstitutional results, and the same statutory text cannot mean one thing on navigable waters and something else entirely on other lands.

Mr. Sturgeon's constitutional arguments cannot be simply brushed aside by finding a Commerce Clause basis for reading the statute solely as applied to him. This Court made very clear in *Clark*, 543 U.S. at 381, that interpreting a statute differently in a facial versus an as-applied constitutional challenge "misconceives – and fundamentally so – the role played by the canon of constitutional avoidance in statutory interpretation." This Court has emphasized that "the meaning of words in a statute cannot change with the statute's application." *Santos*, 553 U.S. at 522 (citing *Clark*, 543 U.S. at 378).

Congress's use of the word "solely" in section 103(c) was not ambiguous. That word served to clarify that State and private inholdings are not exempt from broad federal regulations that apply to private lands everywhere. But to the extent ambiguity exists in section 103(c), the Ninth Circuit should have given "solely" "a limiting construction called for by one of the statute's applications, even though the other of the statute's applications, standing alone, would not support the same limitation." *Id.* In other words, even if hovercraft could constitutionally be excluded from the State's navigable waters, the Ninth Circuit was required to consider the absence of any constitutional basis for enforcing many general National Park Service regulations across inholdings. For example, the National Park Service regulates a broad array of activities including camping, gathering berries, public assembly and meetings, the leashing of pets, the construction of walking trails, and many others where

regulatory limitations would be unsupportable by Congress's commerce power.

To be clear, Congress potentially could extend certain categories of regulations related to interstate commerce to private inholdings. The issue before the Ninth Circuit in this case, however, was whether Congress actually intended to grant broad, general regulatory authority over inholdings. Section 103(c)'s language unambiguously clarifies that Congress had no such intent. And when it found ambiguity in the word "solely," the Ninth Circuit ignored this Court's direction that it must consider the wide array of unconstitutional results flowing from its preferred interpretation of section 103(c). Interpreting the statute in accordance with its plain meaning raises no constitutional concerns.

There is no reason for this Court to await another case involving federal government enforcement regulation on private inholdings, rather than State-owned navigable waters. Delaying decision of this issue would have important consequences for the people of Alaska. Because this is a statutory interpretation case, the Ninth Circuit's reading of section 103(c) now controls, and will have a powerful chilling effect on development and other activity on Native Corporations' inholdings. ASRC urges this Court to grant Mr. Sturgeon's petition and answer this important and straightforward statutory interpretation question now.

ASRC joins John Sturgeon, the State of Alaska, and other Alaska Native Corporation *amici* in urging this Court to grant Mr. Sturgeon's petition. Section 103(c) of ANILCA limits federal authority on non-federal inholdings, and there is no reason to wait to answer the question. No circuit split will ever arise on this issue. ANILCA affects only Alaska CSUs, and absent this Court's intervention, the Ninth Circuit will have the only word. This Court must step in to clarify that Native Corporations remain free to pursue development and subsistence activity – as well as ordinary day-to-day life in Native villages – without pervasive federal government regulatory intervention.

CONCLUSION

For the foregoing reasons, ASRC urges this Court to grant the petition for a writ of certiorari.

Respectfully submitted,

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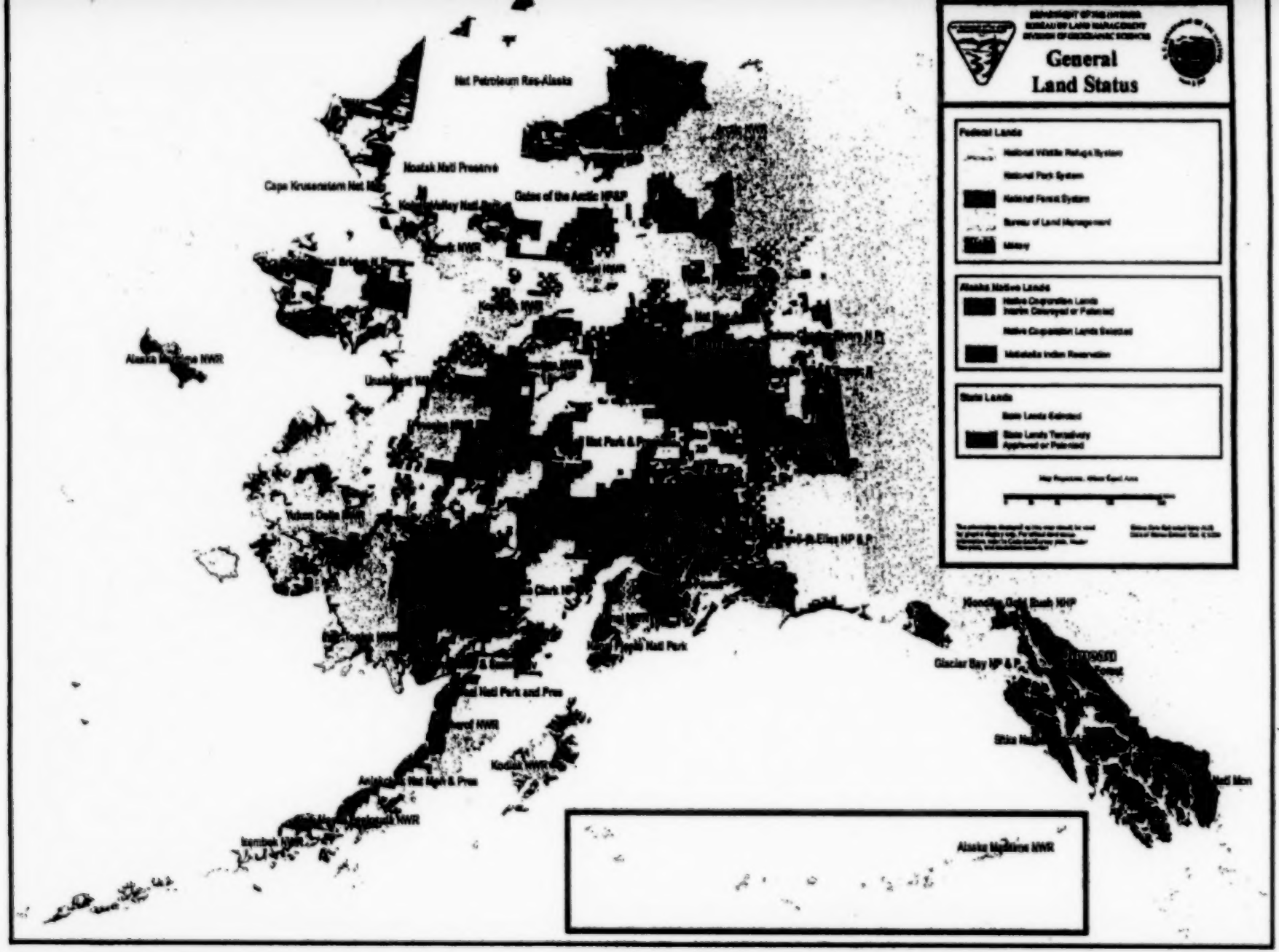
General
Land Status
Federal Lands
Alaska Native Lands
State Lands
Nat Petroleum Res-Alaska
Noatak Natl Preserve
Gates of the Arctic NP&P
Alaska Maritime NWR
Yukon Delta NWR
Glacier Bay NP & P
Alaska Maritime NWR

No. 14-1209

IN THE

Supreme Court of the United States

JOHN STURGEON,

Petitioner,

v.

BERT FROST, IN HIS OFFICIAL CAPACITY AS ALASKA REGIONAL DIRECTOR OF THE NATIONAL PARK SERVICE *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF ON THE MERITS OF *AMICI CURIAE* DOYON, LIMITED, NANA REGIONAL CORPORATION, CALISTA CORPORATION, AHTNA, INCORPORATED, THE ALEUT CORPORATION, BRISTOL BAY NATIVE CORPORATION, GANA-A' YOO, LIMITED, AND TIHTEET' AII, INCORPORATED SEEKING REVERSAL

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF CITED AUTHORITIES iii

I. Interest of the *Amici Curiae* 1

A. The *amici*'s ANCSA land rights are significantly and uniquely affected by the Ninth Circuit's decision 1

B. Shortly after grant of *certiorari*, the National Park Service issued proposed regulations that cite the Ninth Circuit's decision as rulemaking authority 4

II. Summary of the Argument 8

III. Argument 9

A. The text of §3103(c) unambiguously exempts ANCSA lands from CSU regulations 9

B. The history of ANILCA, starting with ANCSA, supports the conclusion that Native Corporation lands are exempt from CSU regulations 12

1. ANILCA, including §3103(c), must be interpreted in light of the economic development purposes of ANCSA 12

Table of Contents

Page

2. The legislative history of ANILCA is consistent with the purposes of ANCSA, but the Ninth Circuit offered a selectively edited version to bolster its interpretation of §3103(c) 17

C. The location of §3103(c) within ANILCA and the language of other relevant provisions of the Act demonstrate Congress's intent to exempt ANCSA lands from CSU regulations 27

D. The Ninth Circuit's interpretation of §3103(c) would lead to an absurd result 31

E. The *amici* respectfully urge this Court to resolve this case in a manner that does not disturb the Ninth Circuit's "Katie John" subsistence decisions 32

IV. Conclusion 36

Exhibit 1 37

TABLE OF CITED AUTHORITIES

Page

CASES

Alaska Fish & Wildlife Federation & Outdoor Council, Inc. v. Alaska, 516 U.S. 906 (1995) 33

Alaska State Legislature v. Alaska, 516 U.S. 815 (1995) 33

Alaska v. Babbitt, 72 F.3d 698 (9th Cir. 1995) 32, 33, 35

Alaska v. Jewell, 134 S. Ct. 1759 (2014) 33

Alaska v. Native Village of Venetie Tribal Government, 522 U.S. 520 (1998) 14

Amoco Production Co. v. Village of Gambell, Alaska, 480 U.S. 531 (1987) 12, 13, 27

City of Angoon v. Marsh, 749 F.2d 1413 (9th Cir. 1984) 13, 16-17

City of Saint Paul v. Evans, 344 F.3d 1029 (9th Cir. 2003) 15

Cited Authorities

Page

Dada v. Mukasey,
554 U.S. 1 (2008).....27

Dolan v. U.S. Postal Service,
546 U.S. 481 (2006).....12

I.N.S. v. Cardoza-Fonseca,
480 U.S. 421 (1987).....11

John v. U.S.,
247 F.3d 1032 (9th Cir. 2001).....32

John v. U.S.,
720 F.3d 1214 (9th Cir. 2013)..... 33, 34, 35

Koniag, Inc. v. Koncor Forest Resource,
39 F.3d 991 (9th Cir. 1994).....15

Stratman v. Leisnoi, Inc.,
545 F.3d 1161 (9th Cir. 2008).....29

Sturgeon v. Masica,
768 F.3d 1066 (9th Cir. 2014).....5

Tarrant Regional Water Dist. v. Herrmann,
133 S. Ct. 2120 (2013).....31

TRW Inc. v. Andrews,
534 U.S. 19 (2001).....11, 35

Cited Authorities

Page

U.S. Nat'l Bank of Oregon v. Indep. Ins. Agents of Am., Inc., 508 U.S. 438 (1993) 27

United States v. Wilson, 503 U.S. 329 (1992) 31

STATUTES

16 U.S.C. §410hh(10) 10

16 U.S.C. §668dd note (ANILCA §304(f)) 30, 31

16 U.S.C. §3101(d) (ANILCA §101(d)) 29

16 U.S.C. §3102(4) (ANILCA §102(4)) 1

16 U.S.C. §3103 (ANILCA §103) 28

16 U.S.C. §3103(c) (ANILCA §103(c)) ..... *passim*

16 U.S.C. §3114 (ANILCA §804) 32, 33

16 U.S.C. §3143 18

43 U.S.C. §1601(b) 13

43 U.S.C. §§1601–1629h ..... *passim*

43 U.S.C. §1606(i) 14, 15, 16

Cited Authorities

Page

43 U.S.C. §1606(j) 14, 15, 16

43 U.S.C. §1609 14

43 U.S.C. §1610 13

43 U.S.C. §1611 13

43 U.S.C. §1613 13

43 U.S.C. §1616(d)(2)(A) 12-13

43 U.S.C. §1619 14

43 U.S.C. §1621(g) 18

43 U.S.C. §1621(i) 17

43 U.S.C. §1631 ..... 13, 34

43 U.S.C. §1635(o)(2) (ANILCA §906(o)(2)) 30

43 U.S.C. §1636 (ANILCA §907) 31

43 U.S.C. §1639 (ANILCA §1412) 30, 34

REGULATIONS

16 C.F.R. Part 242 33

Page

OTHER AUTHORITIES

125 Cong. Rec. 9905 (1979) 3, 13, 23

125 Cong. Rec. 10304 (1979) 19

125 Cong. Rec. 11158 (1979) ..... *passim*

126 Cong. Rec. 21882 (1980) 18, 27

61 Fed. Reg. 35134 (1996) 32

80 Fed. Reg. 65571 (2015) 5

H.R. 3651, §810(c) 19

H.R. Rep. 92-523, reprinted in 1971 U.S.C.C.A.N. 2195 14

S. Rep. No. 96-413 (1979), reprinted in 1980 U.S.C.C.A.N. 5070 ..... 24, 25

Alaska National Interest Lands Conservation Act ("ANILCA"), Pub. L. 96-487, 94 Stat. 2371 (1980) ..... *passim*

"Alaska Native Corporations Share Wealth: ANCSA 7(i) and 7(j) Mandates Redistribution of Some Profits," Alaska Business Monthly, September 2009 16

I. Interest of the *Amici Curiae*.[1]

A. The *amici*'s ANCSA land rights are significantly and uniquely affected by the Ninth Circuit's decision.

This brief is submitted on behalf of *amici curiae* Alaska Native Regional Corporations Doyon, Limited, NANA Regional Corporation, Calista Corporation, Ahtna, Incorporated, The Aleut Corporation, and Bristol Bay Native Corporation, and Alaska Native Village Corporations Gana-A' Yoo, Limited, and Tihteet' Aii, Incorporated. The *amici curiae* were created pursuant to the Alaska Native Claims Settlement Act ("ANCSA"), 43 U.S.C. §§1601–1629h and represent the interests of more than 60,000 Alaska Native shareholders, many of whom have limited incomes and live in remote locations in rural Alaska.

This case has extraordinary importance to the Alaska Native community. The *amici curiae* alone own over 12 million acres of lands granted to them under ANCSA that lie within the boundaries of Alaska conservation system units ("CSUs") created or expanded by the Alaska National Interest Lands Conservation Act ("ANILCA"), Pub. L. 96-487, 94 Stat. 2371 (1980).[2] These lands

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1. The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici curiae*, their shareholders, or their counsel made a monetary contribution to its preparation or submission.

2. Section 102(4) of ANILCA, 16 U.S.C. §3102(4), defines "conservation system unit" as "...any unit in Alaska of the National

constitute an area about 50% larger than Maryland. All ANCSA Corporations together own approximately 18 million acres within ANILCA CSUs, an area larger than West Virginia. (See Exhibit 1.)

ANILCA §103(c), 16 U.S.C. §3103(c), applies to these Native Corporation lands, and while the dispute that gave rise to this litigation is whether §3103(c) allows the National Park Service to enforce its regulations on navigable waters, the Ninth Circuit interpreted the statute in a way that would allow the National Park Service (the "NPS") and other conservation agencies to enforce their regulations on Native Corporation lands and waters within CSUs. However, Congress specifically enacted §3103(c) in order to *exempt* Native Corporation lands from CSU regulations. The Native Corporation *amici* thus are directly impacted by the Ninth Circuit's decision.

Passed in 1971, ANCSA granted approximately 44 million acres of federal land to Alaska Native Corporations in exchange for the complete settlement of the aboriginal land claims of Alaska Natives. The economic development of these lands by Native Corporations was a core purpose underlying this historic settlement, and the Native Corporations made many of their land selections during the 1970s based on development potential.

Park System, National Wildlife Refuge System, National Wild and Scenic Rivers Systems, National Trails System, National Wilderness Preservation System, or a National Forest Monument including existing units, units established, designated, or expanded by or under the provisions of this Act, additions to such units, and any such unit established, designated, or expanded hereafter."

Then, in 1980, Congress passed ANILCA, which placed about 105 million acres of federal land into new or expanded CSUs. One result of this legislation was that approximately 18 million acres of Native Corporation land, as well as some State and private land, became surrounded by CSU lands. Congress included §3103(c) in ANILCA in order to clarify that the location of Native Corporation lands within CSU boundaries would not "restrict use of such lands by the owning Corporations," 125 Cong. Rec. 9905 (1979), or make them "subject to *any* of the laws or regulations that pertain to U.S. public lands" or "controlled by *any* of the public land laws of the United States," *id.* at 11158 (emphasis added).

Congress granted ANCSA lands a complete exemption from CSU regulations in §3103(c), because it very well understood that such regulation would be incompatible with the economic development activities that it contemplated in ANCSA for the benefit of Alaska Natives. Its common sense conclusion was, Native lands cannot be managed as part of a CSU, and still be available for the economic development of ANCSA lands that Congress foresaw as essential to ANCSA. Such an exemption still leaves these lands subject to an extensive body of generally applicable regulations.

Whether or not the NPS likes what Congress did, and whether or not the NPS now wishes to control Native lands in CSUs notwithstanding §3103(c), the fact remains, Congress unambiguously exempted Native land from all CSU regulations 35 years ago, and that remains the law of the land. It is up to Congress, not the NPS, to change that law.

There are already a number of important ANCSA land developments on CSUs, and in reliance on the language of §3103(c) and the assurances of Congress, several of the Native Corporation *amici* are pursuing other resource development projects on lands within CSU boundaries, including mining and oil and gas projects on which millions of dollars have already been spent. Now, however, the Ninth Circuit has issued an opinion that would cast significant doubt on these and future projects by turning §3103(c) on its head and exposing these Native Corporation lands to regulations that could make meaningful economic development impossible. The Ninth Circuit's decision creates two classes of ANCSA lands not contemplated in either ANCSA or ANILCA—those lands within CSUs, and those lands that are not.

The Ninth Circuit's decision, if allowed to stand, would substantially alter and diminish the Congressional settlement of Native land rights under ANCSA and harm the interests of the Native Corporation *amici*.

B. Shortly after grant of *certiorari*, the National Park Service issued proposed regulations that cite the Ninth Circuit's decision as rulemaking authority.

This is no theoretical concern for the *amici*. In its brief in opposition to *certiorari*, at 20-21, the United States aggressively reassured this Court that the Ninth Circuit holding would not broadly authorize regulation of Native owned lands within the boundaries of CSUs, that to do so would require a dramatic shift in policy "under the application of stringent criteria that the NPS has almost never invoked," and that the Native *amici* simply

"misunderstand[] both the NPS's regulations and the decision below...."

However, notwithstanding these statements, the National Park Service has just published draft oil and gas regulations doing exactly what the United States claimed it would not do. See 80 Fed. Reg. 65571 (Oct. 26, 2015). The preamble to these regulations asserts jurisdiction and control over oil and gas development on ANCSA lands within CSUs, citing the Ninth Circuit's decision as authority:

> We also note that because these regulations are generally applicable to NPS units nationwide and to nonfederal interests in those units, they are not "applicable solely to public lands within [units established under ANILCA]," and thus are not affected by section 103(c) of ANILCA. *See Sturgeon v. Masica*, 768 F.3d 1066, 1077–78 (9th Cir. 2014).

Id. at 65573. These regulations are thus proposed to apply for the first time to large tracts of Native lands in National Parks in Alaska.[3] Just as Congress foresaw in enacting

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3. According to the NPS website, these regulations would now apply to 534 operations nationwide, 455 of which (85%) are located in just four units of the NPS system in Tennessee, Kentucky, Ohio and Texas (Lake Meredith, Cuyahoga Valley, Big South Fork, and Big Thicket). http://www.nature.nps.gov/geology/oil_and_gas/9b_index.cfm (then "12 units of the National Park System").

The NPS says many of these operations occur on the mineral estate where the NPS owns the surface estate, and that many were "grandfathered"—i.e., oil and gas operations were inherited by the NPS when it obtained its interests in the lands, and that NPS regulations are necessary to control access issues.

§3103(c), these regulations can have a significant negative impact on the achievement of the economic development purposes of ANCSA.

As but one example, Doyon owns approximately 206,000 acres (320 square miles) of ANCSA lands in the Kandik Basin area of the Yukon-Charley Rivers National Preserve (the CSU at issue in this case) that Doyon selected because of its high potential for the discovery of oil and gas. Doyon selected and was conveyed this land *before* enactment of ANILCA. Under the new regulations and the Ninth Circuit's decision, Doyon's development of these lands will now be subject to Park Service permission.

The NPS has done *precisely* what the Native Corporation *amici* have been concerned with in this case—it has adopted so-called "national" regulations under the cover of the Ninth Circuit ruling that erase the protections of §3103(c) and in effect manage these large areas of ANCSA lands as National Park lands. The door is now open to wholesale regulatory abridgement of the statutory protections contained in §3103(c) in reliance upon the Ninth Circuit's ruling, simply by adopting "national" regulations. The *amici* fully expect this will

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None of these operations are currently located in Alaska, and none of the cited conditions apply to ANCSA lands locate within the boundaries of National Parks in Alaska (generally, ANCSA Corporations own both the surface and subsurface estates, and access in CSUs is subject to special provisions in ANILCA). It is unclear what, if any, expertise the NPS possesses to administer such a program in Alaska's unique arctic and sub-arctic environment, how the NPS would give effect to the land development purposes of ANCSA, or what the NPS's motives are in acting so quickly, in light of its emphatic assurances to this Court just three months ago.

not be the only such assertion of CSU regulations over ANCSA lands in reliance on the Ninth Circuit holding, if it is not reversed.

Congress has unambiguously acted to exempt ANCSA lands from such NPS regulations and that action should be honored. Congress acted, because its common sense appraisal of the likely impact of such NPS regulation of ANCSA lands is that it would limit and discourage such activity. The *amici* have an extraordinary interest in preserving §3103(c)'s exemption on their 12 million acres of ANCSA lands within the boundaries of CSUs. The NPS has already moved to control the use of Native lands in one regulatory program in the very recent past, after *certiorari* was granted herein, and more such efforts are sure to follow if unchecked by this Court.

For these reasons, the Native Corporation *amici* respectfully request that this Court reverse the Ninth Circuit's decision and hold that §3103(c) prohibits the NPS and other conservation agencies from enforcing any of their regulations on Native Corporation lands within CSU boundaries. Even if this Court reaches the same *result* as the Ninth Circuit—that is, even if this Court concludes that §3103(c) does not exempt the navigable river at issue from NPS regulation—the *amici* respectfully submit that the interpretation of the statute should distinguish navigable waters from ANCSA lands and waters and give effect to the complete regulatory exemption that Congress intended, thereby avoiding the destructive impact upon ANCSA lands and waters sanctioned by the Ninth Circuit.

II. Summary of the Argument.

Under the plain language of §3103(c), Native Corporation lands that lie within the boundaries of CSUs are exempt from CSU regulations. Only by reading the second sentence of the provision in isolation was the Ninth Circuit panel able to reach a different conclusion. The panel also read §3103(c) in a way that would render its first and third sentences meaningless. The three sentences of §3103(c) complement and flow logically from one another, and this Court's precedent requires that each sentence in the statute be given effect.

The history of ANCSA and ANILCA demonstrates Congress's unambiguous intent to grant approximately 40 million acres of land to Alaska Native Corporations for purposes including economic development, to assist Alaska Natives in achieving financial independence and self-sufficiency, and by enacting §3103(c), to protect the economic value and development potential of these Native Corporation lands by shielding them from restrictive CSU regulations. To avoid this result, the Ninth Circuit panel completely disregarded ANCSA and then selectively quoted and inaccurately characterized several key pieces of ANILCA's legislative history, to reach an interpretation of §3103(c) that would break the promise made to Alaska Natives in ANCSA. In reality, the legislative history of ANILCA uniformly contradicts the Ninth Circuit panel's decision.

The meaning of §3103(c) is further demonstrated when it is viewed in the context of ANILCA as a whole. The provision was placed in the "Maps" section to clarify that an ANILCA map's depiction of non-public lands

within the boundaries of a CSU is of no legal effect. In addition, numerous other sections of ANILCA support the conclusion that Native Corporation lands are generally exempt from CSU regulations.

The Ninth Circuit panel's holding—that nationwide CSU regulations are applicable to non-public lands but Alaska-specific CSU regulations are not—would lead to an absurd result. As the NPS itself has acknowledged, Alaska-specific regulations are generally relaxations of the nationwide regulations, meaning that non-public lands within the boundaries of a CSU would be regulated more strictly than the public lands within the same CSU boundaries.

Finally, the *amici* respectfully requests that this Court resolve this case in a manner that does not disturb the Ninth Circuit's "Katie John" subsistence decisions.[4]

III. Argument.

A. The text of §3103(c) unambiguously exempts ANCSA lands from CSU regulations.

The plain language of §3103(c) establishes that ANCSA lands that lie within the external boundaries of CSUs are not part of the CSUs and are exempt from CSU regulations. Only by reading the second sentence of the provision in isolation was the Ninth Circuit panel able to reach a different conclusion. The panel also read §3103(c) in a way that would render its first and third sentences

4. The *amici* also agree with the *amicus* brief filed by Arctic Slope Regional Corporation (ASRC) *et al.*

meaningless. Congress wrote the three sentences of §3103(c) to work together as a comprehensive whole.

The first sentence states: "Only those lands within the boundaries of any conservation system unit which are public lands (as such term is defined in this Act) shall be deemed to be included as a portion of such unit." This sentence establishes that non-public lands (including ANCSA lands) lying within the external boundaries of a CSU are not part of the CSU merely by virtue of that geographic fact.[5]

The second sentence states: "No lands which, before, on, or after December 2, 1980, are conveyed to the State, *to any Native Corporation*, or to any private party shall be subject to the regulations applicable solely to public lands within such units." (Emphasis added.) This sentence is a direct complement to the first and means that ANCSA land that is not part of a CSU will not be subjected to CSU regulations simply because it lies within the external boundaries of the unit.

The third sentence states: "If the State, *a Native Corporation*, or other owner desires to convey any such lands, the Secretary may acquire such lands in accordance with applicable law (including this Act), and any such lands shall become part of the unit, and be administered

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5. Consistent with this first sentence, the provision of ANILCA that established the Yukon-Charley Rivers National Preserve, where the dispute underlying this case arose, states that the Preserve contains "approximately one million seven hundred and thirteen thousand acres of *public lands*." 16 U.S.C. §410hh(10) (emphasis added). All of the sections of ANILCA that created or expanded CSUs include the same limitation to "public lands."

accordingly." (Emphasis added.) This sentence explains how the acquisition of land by the relevant Secretary alters the state of affairs established by the first two sentences: the lands "become part of the unit" and are "administered accordingly." Until this happens, though, the lands are not administered as "part of the unit."

"It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (citations and quotations omitted). The Ninth Circuit panel violated this "cardinal principle" by giving undue attention to the second sentence of §3103(c), not only distorting its meaning but also rendering the first and third sentences meaningless. That is, if the second sentence subjects non-public land to regulations governing a CSU, then the land is, for practical purposes, "a portion of" the CSU (contrary to the first sentence), and it can be "administered accordingly" even if it is never acquired by the federal government (contrary to the third sentence). Giving effect to all three sentences, the provision's meaning is unmistakable: non-public lands within the boundaries of a CSU are not part of the unit and will not be subject to CSU regulations unless they are acquired by the federal government.[6]

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6. Even if this Court were to agree with the Ninth Circuit's novel reading of the plain language of §3103(c)—a reading that creates a distinction between nationwide and Alaska-specific CSU regulations—the legislative history of ANILCA, discussed below, unequivocally demonstrates a "clearly expressed legislative intention" contrary to that reading of the language. See *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 433 n.12 (1987).

B. The history of ANILCA, starting with ANCSA, supports the conclusion that Native Corporation lands are exempt from CSU regulations.

A review of the history of ANILCA, beginning in 1971 with ANCSA and continuing through the legislative wrangling that led to the enactment of ANILCA, leads inexorably to the conclusion that ANCSA lands are to remain exempt from CSU regulations.

1. ANILCA, including §3103(c), must be interpreted in light of the economic development purposes of ANCSA.

This Court has held that a statute should be interpreted in light of "any precedents or authorities that inform the analysis." *Dolan v. U.S. Postal Service*, 546 U.S. 481, 486 (2006). None of ANILCA's provisions—particularly those, like §3103(c), that address the land rights of Alaska Native Corporations—can be fully understood without an appreciation for the purposes of ANCSA. Indeed, this Court has only interpreted one section of ANILCA, and, when it did, it looked to three closely related sections of ANCSA. See *Amoco Production Co. v. Village of Gambell, Alaska*, 480 U.S. 531, 552 (1987).

ANCSA was, quite literally, the precursor to ANILCA. In Section 17(d)(2) of ANCSA, Congress directed the Secretary of the Interior to withdraw up to eighty (80) million acres of unreserved federal land "which the Secretary deems are suitable for addition to or creation as units of the National Park, Forest, Wildlife Refuge, and Wild and Scenic Rivers Systems." 43 U.S.C.

§1616(d)(2)(A); see also *Amoco*, 480 U.S. at 549 ("ANILCA's primary purpose was to complete the allocation of federal lands in the State of Alaska, a process begun with the Statehood Act in 1958 and continued in 1971 in ANCSA."). ANILCA was a "direct outgrowth" of ANCSA, 125 Cong. Rec. 9905 (1979), and it should be interpreted as such. It is remarkable, then, that the Ninth Circuit did not even *mention* ANCSA in its opinion.

"Congress enacted ANCSA in 1971 to settle the aboriginal claims of Alaskan Natives." *City of Angoon v. Marsh*, 749 F.2d 1413, 1414 (9th Cir. 1984). Congress intended the settlement to be accomplished "in conformity with the real economic and social needs of Natives" and "with maximum participation by Natives in decisions affecting their rights and property." 43 U.S.C. §1601(b). Thus, as compensation for the complete settlement of the aboriginal claims, Congress authorized the payment of almost $1 billion cash and the conveyance of approximately 40 million acres of land to Alaskan Natives "*to assist them in achieving financial independence and self-sufficiency.*" *City of Angoon*, 749 F.2d at 1414 (emphasis added).[7]

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7. The land provisions of ANCSA are complex, but can be summarized as follows: ANCSA granted up to 22 million acres of surface estate to Village Corporations. ANCSA granted to Regional Corporations the subsurface (mineral) estate beneath those Village surface lands, and approximately 18 million acres of additional surface and subsurface estate. See 43 U.S.C. §§1610, 1611 and 1613. Pursuant to 43 U.S.C. §1631 (a)(1) and (2), all ANCSA land grants include title to lands beneath all water courses and water bodies within or adjacent to their land selections, except where such title was previously vested in the State of Alaska. This is important because up to 50% of the surface area of lands in Alaska is occupied by such waters, depending upon the location. In addition, ANCSA

Obviously, ANCSA was a revolutionary development in American law. "Congress sought to end the sort of federal supervision over Indian affairs that had previously marked federal Indian policy." *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520, 523-24 (1998). As opposed to the lower 48 system of reservations, Alaska Natives would own lands and be tasked with developing them for their own benefit. In Alaska, Natives would be in control of their own financial destiny.

Accordingly, the Ninth Circuit stated that the most significant purpose of the ANCSA land grant was economic development:

> ANCSA's legislative history makes clear that Congress contemplated that land granted under ANCSA would be put primarily to three uses—village expansion, subsistence, and capital for economic development. See H.R. Rep. 92-523 at 5, 1971 U.S.C.C.A.N. at 2195. *Of these potential uses, Congress clearly expected economic development would be the most significant....*

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granted about 4 million acres of surface and subsurface estate to Village Corporations on revoked Indian reservations that opted not to accept any further benefits of ANCSA. 43 U.S.C. §1619. As further compensation, ANCSA also provided for the grant of $962.5 million to Native Corporations in payments terminating in 1981. 43 U.S.C. §1609. ANCSA also required each Regional corporation to share 70% of its proceeds from subsurface and timber resource development of its ANCSA lands with other land-owning Regional Corporations, and in turn with all Village Corporations. 43 U.S.C. §1606(i) and (j). (See discussion *infra*.)

* * *

> [W]e have no doubt that Congress intended, at least, that *those Native corporations that did select land for its economic potential would be able to develop that land and to realize that potential.*

Koniag, Inc. v. Koncor Forest Resource, 39 F.3d 991, 996-997 (9th Cir. 1994) (emphasis added). See also *City of Saint Paul v. Evans*, 344 F.3d 1029, 1031 (9th Cir. 2003) (ANCSA corporations "receive land from the federal government for the purpose of economic development in Native communities"). In short, Congress knew that Alaska Native Corporations would select most of their lands based on economic potential and that the freedom to develop these lands was absolutely essential to the success of the settlement embodied by ANCSA.

The revenues derived from development of these ANCSA lands are fundamental to the innovative settlement Congress devised. Under ANCSA §7(i), 43 U.S.C. §1606(i), each Regional Corporation is required to share seventy percent (70%) of its revenues from natural resource development (including timber, minerals, and oil and gas) on its ANCSA lands with the other land-owning Regional Corporations. Under §7(j), 43 U.S.C. §1606(j), one-half of the revenues that are received by a Regional Corporation under §7(i) are distributed to the Village Corporations located within its regional boundaries, and to its "at large" shareholders (those not enrolled to a Village Corporation). Thus, a share of resource revenues from ANCSA lands flow directly or indirectly to nearly all Alaska Natives. Well over $1 billion derived from oil and

gas, mineral, and timber resource development of ANCSA lands has been distributed to ANCSA Corporations and to Alaska Natives under 43 U.S.C. §1606(i) and (j) since 1971.[8]

In summary, ANCSA served two critical national purposes, one of which—extinguishment of Alaska Native aboriginal title—has already been accomplished. The accomplishment of the second purpose—securing the economic futures of Alaska Natives—is an ongoing concern that hinges significantly on the meaning of §3103(c). Yet, without even acknowledging the existence of ANCSA, the Ninth Circuit panel interpreted §3103(c) in a way that would subject up to 40% of all ANCSA lands to restrictive CSU regulations, rendering them undevelopable and essentially valueless. In effect, the Ninth Circuit panel eviscerates a large portion of the ANCSA land settlement. If that holding is allowed to stand, then ANILCA took back much of what ANCSA promised to Alaska Natives in return for giving up their aboriginal rights.

But surely the Ninth Circuit's interpretation cannot stand. As another panel of that court said in a slightly different context just a few years after ANILCA was passed, "[I]t is inconceivable that Congress would have extinguished [Alaska Natives'] aboriginal claims and insured their economic well-being by forbidding the only real economic use of the lands so conveyed." *City*

8. ASRC, one of the ANCSA Regional Corporations, alone has distributed in excess of $1 billion pursuant to §7(i). See http://www.asrc.com ("About Us," then "We Are ASRC"); see also "Alaska Native Corporations Share Wealth: ANCSA 7(i) and 7(j) Mandates Redistribution of Some Profits," Alaska Business Monthly, September 2009 (available at http://www.thefreelibrary.com).

of Angoon, 749 F.2d at 1418.[9] When read against the backdrop of ANCSA, one critical intention of §3103(c) becomes abundantly clear: to preserve the economic value of lands conveyed to Native Corporations by exempting them from regulations written to govern CSUs.

2. The legislative history of ANILCA is consistent with the purposes of ANCSA, but the Ninth Circuit offered a selectively edited version to bolster its interpretation of §3103(c).

Having interpreted the text of §3103(c) without even one mention of ANCSA, the Ninth Circuit panel went on to suggest that its strained reading of the provision is supported by the legislative history of ANILCA. This is absolutely, unequivocally incorrect. Every single piece of legislative history cited by the panel, quoted accurately and fully, actually demonstrates that Congress intended to exempt ANCSA lands from *all* CSU regulations. There is no legislative history whatsoever supporting the

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9. The Ninth Circuit panel that decided *City of Angoon* relied heavily on ANCSA in concluding that Native Corporation lands within the external boundaries of a National Monument created by ANILCA are not "within" the Monument and therefore are not subject to a timber harvesting ban applicable to the Monument. See, e.g., 749 F.2d at 1416 (citing ANCSA §22(i) (43 U.S.C. §1621(i)) in support of its conclusion that "Congress has made it clear that the Secretary cannot manage private lands which have been conveyed to a Native Corporation"). That panel also cited §3103(c) as support for its conclusion that "the drafters of ANILCA never intended the mere location of boundary lines on maps delineating the overall conservation system to indicate that private lands conveyed to Native Corporations were to be treated as public lands." *Id.* at 1417-18.

panel's artificial distinction between Alaska-specific and nationwide regulations. Only through extensive editing was it able to paint a different picture.

Congress began considering legislation that would become ANILCA in the late 1970s. Alaska Native Corporations, having already made their land selections, were greatly concerned. ANILCA would place approximately 105 million acres of federal lands in new or expanded CSUs, and Congress sought to include entire ecosystems within the units. As a result, many ANCSA lands would be completely surrounded by CSU lands: the Native Corporation *amici* alone own about 12 million acres within ANILCA CSUs, comprising about 30% of all ANCSA lands; all ANCSA Corporations together own approximately 18 million acres within ANILCA CSUs, or about 40% of all ANCSA lands.[10] The Native Corporations knew that this development would directly threaten their rights under the ANCSA land settlement, and they fought vigorously for the inclusion of provisions in ANILCA that would preserve the economic potential of their lands and prevent them from being affected by the CSUs, and to preserve the promise made to Alaska Natives in ANCSA that they would be able to economically develop their ANCSA lands. See, e.g., 126 Cong. Rec. 21882 (1980) (referencing concerns of Doyon, Limited president Tim

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10. See Exhibit 1 attached hereto (Map of ANCSA Lands Within CSUs). Some of the Native Corporation *amici*'s land holdings in CSUs are surface estate only, some are subsurface only, and some are both surface and subsurface. The ANCSA lands within CSUs represent from about 20% to 100% of the total ANCSA entitlements of the individual *amici*. The small portion of CSU lands within pre-ANCSA Wildlife Refuges is subject to additional federal refuge regulation pursuant to 43 U.S.C. §1621(g), and 16 U.S.C. §3143.

Wallis). These efforts, and those of the State of Alaska, resulted in the enactment of §3103(c).

Section 3103(c) (ANILCA §103(c)) began as an amendment offered by Representative John Seiberling.[11] On May 15, 1979, Rep. Seiberling took to the House floor and described in detail the purpose of the amendment:

> The other amendment is an amendment to respond to a point that I think has been beaten to death by the gentleman from Alaska (Mr. YOUNG) but I think it needs to be clarified because some people may not understand.
>
> The Udall-Anderson bill...includes certain State-selected lands and certain State-owned lands on which they already have patent (as well as some Native or private lands) within the borders of some of the conservation system units in Alaska.... [T]here is no question in my mind that the present text of the Udall-Anderson bill *does not alter in any way the ability of the State or Natives to do what it will with those lands....*[12]

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11. Rep. Seiberling's amendment was in the form of a new subsection (c) of §810 of H.R. 3651, the Udall-Anderson bill that eventually became ANILCA. Section 810 later was renumbered as §103, and the subsection 810(c) proposed by Seiberling precisely duplicates the enacted version of §103(c), with the minor exception of an internal cross-reference at the end to account for the different numbering. See 125 Cong. Rec. 10304-05 (1979).

12. Here, Rep. Seiberling was referencing numerous provisions of ANILCA other than §3103(c) that establish that Native lands are not to be administered as part of CSUs. See Section C, below.

> *All this amendment does is restate and make clear beyond any doubt that any State, Native or private lands, which may lie within the outer boundaries of the conservation system unit are not parts of that unit and are not subject to regulations which are applied to public lands which, in fact, are part of the unit.*
>
> *[T]his amendment reinforces the already ample protections accorded to such lands that are within the boundaries of such a park or refuge or other conservation area.*

125 Cong. Rec. 11158 (emphasis added).

In suggesting that the legislative history supports its reading of §3103(c), the Ninth Circuit panel cited just a few words of this statement, noting only that Rep. Seiberling "offered the view that his amendment 'restate[d] and ma[de] clear' that nonfederal lands within CSUs would not be 'subject to regulations which are applied to public lands which, in fact, are part of the unit.'" Op. 24 (citing 125 Cong. Rec. 11158). The panel omitted Rep. Seiberling's contemporaneous explanation that he offered his amendment to reinforce the existing text of the bill, which, he believed, "*does not alter in any way the ability of the State or Natives to do what it will with those lands.*" 125 Cong. Rec. 11158 (emphasis added).

After providing the summary quoted above, Rep. Seiberling responded to skeptical questioning from Alaska Rep. Don Young:

> Mr. YOUNG of Alaska. Are there any catch words in the gentleman's amendment that say there is compatibility with the unit or anything like this that will preclude us because of some nice little sharp lawyer sitting down in one of the coalition areas?
>
> * * *
>
> Mr. SEIBERLING. Mr. Chairman, what it does is say that the fact that it is within the boundaries drawn on the map for that conservation unit does not in any way change the status of that State, native, or private land *or make it subject to any of the laws or regulations that pertain to U.S. public lands, so that those inholdings are clearly not controlled by any of the public land laws of the United States.*

Id. (emphasis added).

Citing part of Rep. Seiberling's answer, the Ninth Circuit panel observed that "[t]he first sentence of §3103(c) makes clear that the boundaries of CSUs 'do[...] not in any way change the status of that State, native, or private land' lying within those boundaries." Op. 21 (quoting 125 Cong. Rec. 11158 (1979)). The panel's reliance on this passage is puzzling. Before ANILCA, the "status" of these lands was that they did not lie within CSUs and therefore were not subject to regulations governing CSUs. Rep. Seiberling's clarification—that he offered §3103(c) to ensure that this status would not change—conflicts starkly with the panel's interpretation of the provision.

More troubling is the fact that the Ninth Circuit panel chose to cut Rep. Seiberling's one-sentence answer in half and omit the portion that directly contradicts its holding: the statement that the location of non-public land within CSU boundaries does not "make it subject to *any* of the laws or regulations that pertain to U.S. public lands, so that those inholdings are clearly not controlled by *any* of the public land laws of the United States." 125 Cong. Rec. 11158 (emphasis added). The panel also ignored Rep. Seiberling's declaration, from the same floor session, that his amendment "makes it clear that any lands, State, native or private lands, which lie within the outer boundaries of the conservation unit in the Udall bill *are not subjected to regulations which are applied to public lands.*" *Id.* at 11156 (emphasis added).

ANILCA's exemption of ANCSA lands from CSU regulations was also confirmed by the primary sponsor of ANILCA in the House, Representative Morris "Mo" Udall, who stated:

> It is important to remember, when considering the conservation and other provisions of the Udall-Anderson substitute, that this bill, like all other proposals for legislation on this topic *...is a direct out-growth of the Alaska Native Claims Settlement Act of 1971....* Thus, it is important to recall the relationship between the conservation system units...and the lands which the Native peoples of Alaska have received and will receive pursuant to the Alaska Native Claims Settlement Act in return for the extinguishment of their claims based on aboriginal title.

> We recognize that there are certain lands which have been selected by Native Corporations and which are within the exterior boundaries of some of the conservation system units. This situation occurs because of the location of Native villages along stream courses and because unit boundaries have been drawn, wherever possible, to include whole ecosystems and to follow natural features, and thus also include some Native Corporation lands. *I want to make clear that inclusion of these Native lands within the boundaries of conservation system units is not intended to affect any rights which the Corporations may have under this act, the Alaska Native Claims Settlement Act, or any other law, or to restrict use of such lands by the owning Corporations nor to subject the Native lands to regulations applicable to the public lands within the specific conservation system unit.*

125 Cong. Rec. 9905 (1979) (emphasis added).

In its opinion, the Ninth Circuit panel merely observed that Rep. Udall "declared that nonfederal land would not be constrained by 'regulations applicable to the public lands within the specific conservation system unit.'" Op. 24 (citing 125 Cong. Rec. 9905 (1979)). It made no mention whatsoever of Rep. Udall's explanation, *in the same sentence*, that "inclusion of these Native lands within the boundaries of conservation system units is not intended to affect *any* rights which the corporations may have under this act, the Alaska Native Claims Settlement Act, or any other law, *or to restrict use of such lands by the owning corporations*[.]" 125 Cong. Rec. 9905 (emphasis added).

The Senate Committee on Energy and Natural Resources shed further light on the scope of the exemption. In a 1979 report, the Committee explained:

> Those private lands, and those public lands owned by the State of Alaska [located within the external boundaries of CSUs] are not to be construed as subject to the management regulations which may be adopted to manage and administer any national conservation system unit which is adjacent to, or surrounds, the private or non-Federal public lands. Federal laws and regulations of general applicability to both private and public lands, such as the Clean Air Act, the Water Pollution Control Act, U.S. Army Corps of Engineers wetlands regulations and other Federal statutes and regulations of general applicability would be applicable to private or non-Federal public land inholdings within conservations [sic] system units, and to such lands adjacent to conservation system units, and are thus unaffected by the passage of this bill.

S. Rep. No. 96-413, at 303 (1979), as reprinted in 1980 U.S.C.C.A.N. 5070, 5247. The Committee's intent, then, was that non-public lands within the external boundaries of CSUs would be exempt from CSU regulations but would remain subject to "Federal laws and regulations of general applicability to both private and public lands," such as the Clean Air Act and the Clean Water Act.

The Committee's report also reveals why the word "solely" was included in the second sentence of §3103(c)—a

reason quite different than the Ninth Circuit panel asserted. Without that word, the second sentence would exempt non-public lands within the external boundaries of CSUs from all "regulations applicable [ ] to public lands within [CSUs]." See 16 U.S.C. §3103(c). Such language could be read to exempt these non-public lands from not only CSU regulations but also regulations promulgated under environmental statutes like the Clean Air Act and the Clean Water Act. As such, the word "solely" was included to distinguish between these two classes of regulations.

The Ninth Circuit panel acknowledged only a handful of the Committee's words, stating that the report "notes that §[3]103(c) would exempt non-Federal land from 'regulations which may be adopted to manage and administer any [CSU] which is adjacent to, or surrounds, the private or non-Federal public lands.'" Op. 24-25 (citing S. Rep. No. 96-413, at 303 (1979), reprinted in 1980 U.S.C.C.A.N. 5070, 5247). The panel said *nothing* about the second sentence quoted above, which shows that the Committee did not intend to distinguish between nationwide and Alaska-specific regulations, but rather, between CSU regulations and laws—like the Clean Air Act and the Clean Water Act—that apply to *all* land in the United States, whether public or private. Only by ignoring the actual words of the Senate Report could the Ninth Circuit avoid the Committee's true intent.

Finally, just before the final vote on ANILCA, a question by the president of Doyon, Limited (one of the Native Corporations filing this brief) prompted Alaska Senator Ted Stevens (joined by Senator Henry "Scoop" Jackson, Chairman of the Senate Committee on Energy

and Natural Resources) to offer one last assurance to Alaska Native Corporations that the use and development of their lands would not be affected by the Act:

> If I may ask it of the chairman, *there has been a question raised by Tim Wall[is], president of Doyon, Ltd., one of the Alaska Native regional corporations.* I wish to make certain that the record is clear with regard to the question he raised.
>
> In the substitute, many parcels of land selected by Native corporations are included within the exterior boundaries of the proposed conservation system units. This situation occurs because the unit boundaries have been drawn, whenever possible, to encompass natural areas or to follow natural features, and thus also to include Native lands which, if the corporations ever decide to dispose of their property, could become part of the conservation system unit. *The fact that Native lands lie within the boundaries of conservation system units is not intended to affect any rights which the corporations have under this act, the Alaska Native Claims Settlement Act, or any other law.... The Native organizations have been given repeated assurances that including their lands within conservation units will not affect the implementation of the Native Claims Settlement Act.* We intend to have these assurances translated into practice by the administrative agencies.

> Does the Chairman of our Committee agree with that statement?
>
> MR. JACKSON: Mr. President, I agree with the Senator from Alaska on this matter.

126 Cong. Rec. 21882 (1980) (emphasis added). The Ninth Circuit panel did not acknowledge Senator Stevens' unambiguous pledge in its opinion.

Based upon these emphatic declarations, Alaska Native Corporations had good reason to believe that Congress intended to stand by the promise it made in ANCSA and that Native Corporation lands would be exempt from CSU regulations. Only by heavily editing and mischaracterizing this legislative history was the Ninth Circuit panel able to justify a different conclusion.

C. The location of §3103(c) within ANILCA and the language of other relevant provisions of the Act demonstrate Congress's intent to exempt ANCSA lands from CSU regulations.

This Court has held that provisions of ANILCA "must be viewed in the context of the Act as a whole." *Amoco*, 480 U.S. at 549; see also *Dada v. Mukasey*, 554 U.S. 1, 16 (2008); *U.S. Nat'l Bank of Oregon v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 438, 455 (1993). Viewing §3103(c) in the context of ANILCA as a whole, any lingering doubts about its meaning are resolved.

First, the placement of §3103(c) within ANILCA is telling. In its brief in opposition to certiorari, the United States suggested that §3103(c) must be inconsequential

because it is "buried" in the "Maps" section, §3103. However, §3103 is actually a critical part of ANILCA. In ANILCA, Congress described the 105 million acres of CSUs it was creating or expanding by reference to the maps incorporated into the Act, rather than using legal descriptions. By including subsection (c), Congress sought to eliminate the possibility that a person would look at an ANILCA map, see that non-public land falls within the boundaries of a CSU, and assume that it is part of the CSU or subject to CSU regulations. As discussed above, Representative Seiberling, the sponsor of the amendment that became §3103(c), explained on the House floor that this was the precise purpose of the provision:

> Mr. Chairman, what [§3103(c)] does is say that the fact that [State, native, or private land] is within the boundaries drawn on the map for that conservation unit does not in any way change the status of that State, native, or private land or make it subject to *any* of the laws or regulations that pertain to U.S. public lands, so that those inholdings are clearly not controlled by *any* of the public land laws of the United States.

125 Cong. Rec. 11158 (1979) (emphasis added). Far from creating a distinction between Alaska-specific and nationwide regulations, as the Ninth Circuit held, §3103(c) clarified that non-public lands would not be subject to *any* CSU regulations, notwithstanding their location on an ANILCA map.

This reading of §3103(c) is also consistent with other relevant provisions of ANILCA, none of which

were given any weight by the Ninth Circuit. The first section of ANILCA explains that the Act serves both environmental *and* economic purposes, in that it "provides sufficient protection for the national interest in the scenic, natural, cultural and environmental values on the public lands in Alaska, *and at the same time provides adequate opportunity for satisfaction of the economic and social needs of the State of Alaska and its people*[.]" 16 U.S.C. §3101(d) (ANILCA §101(d)) (emphasis added). The Ninth Circuit panel cited this provision but then immediately mischaracterized a passage from an earlier Ninth Circuit decision to suggest that ANILCA is a strictly conservational measure: "Summarized succinctly, ANILCA is generally concerned with the designation, disposition, and management of land for environmental preservation purposes.' *Stratman v. Leisnoi, Inc.*, 545 F.3d 1161, 1165 (9th Cir. 2008)." Op. 19.

What the Ninth Circuit actually said in *Stratman* was this: "*Although* ANILCA is generally concerned with the designation, disposition, and management of land for environmental preservation purposes, *part of ANILCA is devoted to the implementation and cleanup of ANCSA*." 545 F.3d at 1165 (emphasis added; citation omitted). The panel's careful avoidance of the ANCSA reference is telling. Of ANILCA's 180 pages, only about 45 related to the creation or expansion of CSUs (see Titles II-VII), while most of the remaining 135 were made up of compromise provisions addressing various ANCSA and State concerns (see, e.g., Titles VIII-XIV and parts of Title I). Contrary to the panel's suggestion, ANILCA was not only directed at environmental protection—it was also directed at implementing ANCSA.

Further evidence of the overriding importance of ANCSA can be found in §1412 of ANILCA (43 U.S.C. §1639), which provides, "Except as specifically provided in this Act, (i) the provisions of the Alaska Native Claims Settlement Act are fully applicable to this Act, and (ii) nothing in this Act shall be construed to alter or amend any of such provisions." Needless to say, the Ninth Circuit's interpretation of §3103(c) would "alter or amend" the very promise at the heart of ANCSA, that ANCSA lands would be available for economic development and other purposes, for the benefit of Alaska Natives.

Several more-specific provisions of ANILCA demonstrate that non-public lands within the external boundaries of CSUs are generally exempt from CSU regulations. Most notably, 43 U.S.C. §1635(o)(2) (ANILCA §906(o)(2)) provides, "*Until conveyed* [to a Native Corporation or the State], all Federal lands within the boundaries of a conservation system unit...shall be administered in accordance with the laws applicable to such unit." (Emphasis added.) The obvious corollary to this requirement is that once lands within the boundaries of a CSU are conveyed to a Native Corporation or the State, they shall *not* "be administered in accordance with the laws applicable to such unit." If this were not the case, 43 U.S.C. §1635(o)(2) would be entirely superfluous.

Another provision, Section 304(f) (16 U.S.C. §668dd note), provides that owners of non-federal lands within any National Wildlife Refuge (including ANCSA corporations) may enter into cooperative management agreements with the Secretary of the Interior, and "the land subject to the agreement shall be managed by the owner...in a manner compatible with the major purposes of the refuge."

(Emphasis added.) If a landowner does *not* enter into a cooperative management agreement, the lands are *not* subject to management compatible with the CSU. If this were not the case, ANILCA §304(f) would be unnecessary.

Also, 43 U.S.C. §1636 (ANILCA §907), which established the Alaska Land Bank Program, provides in subsections (a)(2) and (b)(3) for a private landowner (including ANCSA corporations) whose lands adjoin federal land to "consent" to coordinated management by the federal government. If the federal government already had the power to manage such private lands, no such consent would be necessary.

These are the type of provisions to which Representative Seiberling was referring when he said, "[T]here is no question in my mind that the present [pre-§3103(c)] text of the Udall-Anderson bill *does not alter in any way the ability of the State or Natives to do what it will with those lands.*" 125 Cong. Rec. 11158 (emphasis added). His proposal of the language that would become §3103(c) was intended to eliminate any possible remaining doubt in this regard.

D. The Ninth Circuit's interpretation of §3103(c) would lead to an absurd result.

This Court has instructed that an interpretation of a statute that leads to an absurd result should be avoided if there is a reasonable alternative interpretation. See, e.g., *Tarrant Regional Water Dist. v. Herrmann*, 133 S. Ct. 2120, 2131 (2013); *United States v. Wilson*, 503 U.S. 329, 334 (1992). Under the Ninth Circuit panel's strained interpretation of §3103(c), non-public lands

(including ANCSA lands) that are situated within the external boundaries of Alaska CSUs would be subject to nationwide CSU regulations but would be exempt from Alaska-specific CSU regulations. However, the National Park Service has itself recognized that Alaska-specific regulations "generally are relaxations of prohibitions contained in the general regulations." See 61 Fed. Reg. 35134 (1996). It would be patently absurd for ANCSA lands to be subject to greater use restrictions than the surrounding CSUs, and this Court should avoid such a result.

E. The *amici* respectfully urge this Court to resolve this case in a manner that does not disturb the Ninth Circuit's "Katie John" subsistence decisions.

While the primary objective of the Native Corporation *amici* in filing this brief is to have this Court reverse the Ninth Circuit's erroneous interpretation of §3103(c), they also want to stress the critical importance of this Court doing so in a way that leaves undisturbed the Ninth Circuit's 1995 holding that certain navigable waters in Alaska are "public lands" for purposes of §804 of ANILCA (16 U.S.C. §3114) and are therefore subject to the rural subsistence priority established by that provision. *Alaska v. Babbitt*, 72 F.3d 698 (9th Cir. 1995), cert. denied, 517 U.S. 1187 (1996); see also *John v. U.S.*, 247 F.3d 1032 (9th Cir. 2001) (en banc).

It appears likely that the United States will argue that even if the Ninth Circuit's interpretation of §3103(c) is overbroad, the navigable river at issue still constitutes "public lands" for purposes of that statute under the

Babbitt holding, and thus is subject to NPS regulation. See "Brief for the Respondents in Opposition," at pp. 15-16.

However, the matter is not presently before this Court, nor should it be. The Ninth Circuit did not address §3103(c) in its subsistence-specific decision in *Babbitt*, and while the parties in the instant case debated the scope of the *Babbitt* holding in their lower court briefing, neither the district court nor the Ninth Circuit reached that issue. It is clear that *Babbitt* was decided in a manner that does not apply to the instant case.

The holding in *Babbitt* resolved a decades-long cycle of litigation and intense political division about subsistence rights, and this Court has rejected several invitations to review it. See *Alaska State Legislature v. Alaska*, 516 U.S. 815 (1995); *Alaska Fish & Wildlife Federation & Outdoor Council, Inc. v. Alaska*, 516 U.S. 906 (1995); *Alaska v. Babbitt, supra*; *John v. U.S.*, 720 F.3d 1214 (9th Cir. 2013), cert. denied sub nom. *Alaska v. Jewell*, 134 S. Ct. 1759 (2014).

The Ninth Circuit's 2013 decision in *John v. U.S.* upheld the federal subsistence regulations adopted pursuant to ANILCA Title VIII. See 16 C.F.R. Part 242. In part, this decision upheld the application of these subsistence regulations to waters on ANCSA lands within CSUs, by upholding their definition of "public lands" and "inland waters" for subsistence purposes based upon federally reserved water rights in such Native-owned waters. *Id.* at 1232-1233. It thereby extended to such Native-owned waters the subsistence priority under ANILCA §804. The decision in effect used federally reserved water rights to transform these Native-owned waters into "public

lands" for the limited purposes of the subsistence priority, resolving this difficult issue in a manner that the Native community strongly supports. This decision includes a lengthy and detailed history of the subsistence issue and its resolution by the courts, as well as a recognition of the difficulties encountered by the courts in resolving this dispute and the limitations of the novel "reserved water rights" solution eventually reached. *John*, 720 F.3d at 1226, 1245.

Federal reserved water rights arising in connection with provisions of ANILCA cannot be applied so as to amend ANCSA or frustrate the fundamental purposes of its land conveyances. As discussed above, §1412 of ANILCA (43 U.S.C. §1639) provides, "...(i) the provisions of the Alaska Native Claims Settlement Act are fully applicable to this Act, and (ii) nothing in this Act shall be construed to alter or amend any of such provisions."

Nor can this doctrine be applied in a way that renders §3103(c) inoperative. If this unique subsistence rationale were extended to matters of land use regulation arising under §3103(c), the result would simply be to swallow and eviscerate §3103(c) as it relates to ANCSA lands in CSUs, because such lands contain large amounts of water acreage, which could be subject to federal reserved water rights.[13] Such a result would render §3103(c) superfluous, and thus would be contrary to this Court's precedents.

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13. Pursuant to 43 U.S.C. §1631(a)(1) and (2), Alaska Native Corporations receive title to the lands beneath nearly all waters within or adjacent to their ANCSA land selections. This is important because Alaska contains so many lakes (3 million) and rivers (12,000), and because up to 50% or more of the surface area of lands in Alaska can be occupied by waters, depending upon the location.

See, e.g., *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001). Accordingly, any reasonable application of the regulatory exemption under §3103(c) to Native lands in CSUs must include a clear extension of this exemption to such waters for it to be effective.

The 2013 decision in *John v. U.S.*, and this Court's subsequent denial of *certiorari*, appear to have finally put to rest further direct challenges relating to the subsistence issue. However, in light of the Ninth Circuit's recognition of the difficulties and limitations of its original *Babbitt* holding, the 2013 decision should not be applied to this case concerning the application of §3103(c) to ANCSA lands and waters.

Today, nearly 20 years after the Ninth Circuit announced its decision, the *Babbitt* holding is a well-settled fact of life for rural Alaskans who rely heavily on subsistence hunting and fishing. Thus, in seeking to have this Court reverse the Ninth Circuit's erroneous interpretation of §3103(c), the Native Corporation *amici* also wish to express their firm support for the *Babbitt* holding as applied to the ANILCA subsistence preference, and they strongly urge this Court to resolve the instant case in a manner that leaves that holding intact as the solution to subsistence.

IV. Conclusion.

For the foregoing reasons, this Court should reverse the Ninth Circuit's holding in this matter and hold instead that §3103(c) exempts Native Corporation lands within the boundaries of CSUs from all CSU regulations, whether those regulations are applicable nationwide or only in Alaska, and whether those regulations apply to public lands or to private lands within such CSUs.

Respectfully submitted,

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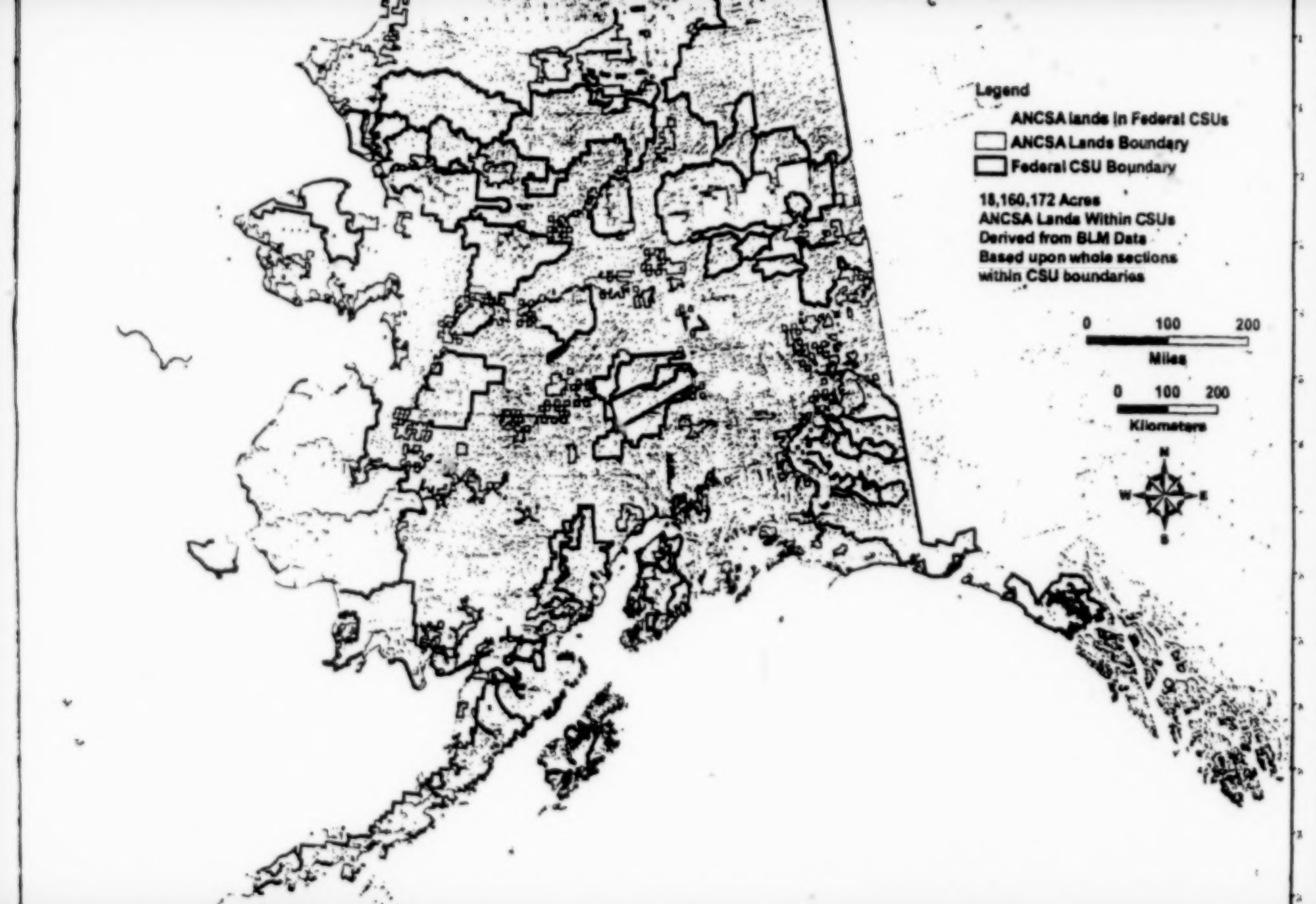
EXHIBIT 1
MAP OF ANCSA LANDS WITHIN ALASKA
FEDERAL CONSERVATION SYSTEM UNITS


Legend
ANCSA lands in Federal CSUs
ANCSA Lands Boundary
Federal CSU Boundary
18,160,172 Acres
ANCSA Lands Within CSUs
Derived from BLM Data
Based upon whole sections
within CSU boundaries
0 100 200
Miles
0 100 200
Kilometers
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W
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S

No. 14-1209

In the
Supreme Court of the United States

JOHN STURGEON,

Petitioner,

v.

SUE MASICA, in Her Official Capacity as Alaska Regional Director of the National Park Service, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

The Alaska National Interest Lands Conservation Act (ANILCA) says state, Native, and private lands within the boundaries of Alaska's national parks are not part of the park system. These non-federal lands are free from regulations applicable "solely" to the "conservation system unit" in which they sit. "Conservation system unit" refers to various federally managed wilderness areas in Alaska, including national parks. Does ANILCA prohibit the application of National Park Service regulations to non-federal lands within Alaska's national parks?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

INTEREST OF AMICUS CURIAE 1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. THE PLAIN LANGUAGE OF ANILCA PRESERVES ALASKA'S PRIMACY OVER LAND AND WATER USE BY LIMITING THE REACH OF NATIONAL PARK SERVICE REGULATIONS TO FEDERAL LANDS . .. 3

II. CANONS OF STATUTORY CONSTRUCTION CONFIRM THAT ANILCA DOES NOT EXPAND NATIONAL PARK SERVICE REGULATIONS TO STATE, NATIVE, AND PRIVATE LAND 5

A. The Context of § 3103(c) Demonstrates That Congress Intended for Non-Federal Lands Encased in Conservation System Units To Remain Free of Default National Park Service Regulations 5

B. ANILCA Lacks Any Clear Statement of Intent To Trespass upon Alaska's Supremacy over Management of Non-Federal Land and Water 8

TABLE OF CONTENTS—Continued

Page

III. EVEN IF ANILCA IS AMBIGUOUS, THIS COURT SHOULD NOT DEFER TO THE NATIONAL PARK SERVICE'S INTERPRETATION 10

A. The National Park Service's Patchwork Approach To Regulating Non-Federal Land and Water Is Not a Permissible Reading of the Statute . . 11

B. This Court Should Not Defer to the National Park Service's Interpretation Because Other Federal Agencies Also Manage Conservation System Units Under ANILCA 13

C. The Agency's Flip-Flop in Its Interpretation of ANILCA Extinguishes Any Remaining Persuasive Power 14

CONCLUSION 17

TABLE OF AUTHORITIES

Page

Cases

Alaska Dep't of Envt'l Conservation v. E.P.A., 540 U.S. 461 (2004) 15

Bowen v. American Hosp. Ass'n, 476 U.S. 610 (1986) 13

Chevron, U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837 (1984) 3, 11-12, 14

Coeur Alaska, Inc. v. Se. Alaska Conservation Council, 557 U.S. 261 (2009) 1

Decker v. Nw. Envtl. Def. Ctr., 133 S. Ct. 1326 (2013) 1

Good Samaritan Hosp. v. Shalala, 508 U.S. 402 (1993) 15

Hess v. Port Authority Trans-Hudson Corporation, 513 U.S. 30 (1994) 9

INS v. Cardoza-Fonseca, 480 U.S. 421 (1987) . . . 15

Michigan v. EPA, 135 S. Ct. 2699 (2015) . . 11-12

Mohamad v. Palestinian Authority, 132 S. Ct. 1702 (2012) 4

Moskal v. United States, 498 U.S. 103 (1990) . . 4

Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Services, 545 U.S. 967 (2005) . . . 15

Proffitt v. FDIC, 200 F.3d 855 (D.C. Cir. 2000) . . . 13

Pub. Citizen v. United States Dep't of Justice, 491 U.S. 440 (1989) 15

TABLE OF AUTHORITIES—Continued

Page

Public Citizen Health Res. Grp. v. FDA, 704 F.2d 1280 (D.C. Cir. 1983) 13

Rapanos v. United States, 547 U.S. 715 (2006) . . 1

Robinson v. Shell Oil Co., 519 U.S. 337 (1997) . . 5

Sackett v. EPA, 132 S. Ct. 1367 (2012) 1

Skidmore v. Swift & Co., 323 U.S. 134 (1944) . . . 14-15

Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs, 531 U.S. 159 (2001) 1

Sturgeon v. Masica, 768 F.3d 1066 (9th Cir. 2014) 2-3, 7

United States v. Alaska, 521 U.S. 1 (1997) 9

United States v. Bass, 404 U.S. 336 (1971) . . . 8-9

Utility Air Regulatory Grp. v. E.P.A., 134 S. Ct. 2427 (2014) 5, 11

Weinberger v. Hynson, Westcott & Dunning, Inc., 412 U.S. 609 (1973) . 7

United States Statutes

16 U.S.C. § 3101, *et seq.* 4-8, 11 14

United States Regulations

36 C.F.R. § 1.2(a)(3) 12-13

50 C.F.R. § 36.1(b) 14

TABLE OF AUTHORITIES—Continued

Page

Miscellaneous

46 Fed. Reg. 31,836 (June 17, 1981) 16

48 Fed. Reg. 30,252 (June 30, 1983) 10

52 Fed. Reg. 35,238 (Sept. 18, 1987) 10, 16

61 Fed. Reg. 35,133 (July 5, 1996) 10, 16

Hansen, Andrea K., *The Alaska National Interest Lands Conservation Act of 1980*, 22 J. Land Resources & Envtl. L. 435 (2002) 6, 9

INTEREST OF AMICUS CURIAE

Pacific Legal Foundation (PLF) was founded in 1973 and is widely recognized as the most experienced nonprofit legal foundation of its kind.[1] Among other matters affecting the public interest, PLF defends the constitutional principle of federalism environmental law. PLF attorneys have participated as lead counsel or counsel for amici in several cases before this Court involving important issues of federal water and land use law. *E.g.*, *Decker v. Nw. Envtl. Def. Ctr.*, 133 S. Ct. 1326 (2013); *Sackett v. EPA*, 132 S. Ct. 1367 (2012); *Coeur Alaska, Inc. v. Se. Alaska Conservation Council*, 557 U.S. 261 (2009); *Rapanos v. United States*, 547 U.S. 715 (2006); *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001).

PLF urges the Court to uphold the principles of federalism honored by ANILCA and vital to our national structure. PLF also counsels against deference to the National Park Service because the statute does not leave room for agency discretion regarding authority to regulate non-federal lands, and because the National Park Service's interpretation cannot be reconciled with ANILCA's text.

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[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, PLF affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than PLF, its members, or its counsel made a monetary contribution to the brief's preparation or submission.

INTRODUCTION AND SUMMARY OF ARGUMENT

What began as a lone hunting trip has escalated into a battle over fundamental principles of federalism and the reach of the federal bureaucracy. In 2007, John Sturgeon boarded his hovercraft and struck out into the Alaskan wilderness along the Nation River. His plan to hunt moose fizzled when he bumped into three National Park Service officers. They insisted that national park regulations forbade the use of hovercrafts on the river. Sturgeon pointed out that the river ran through state land. He then learned that the National Park Service claims the power to impose its regulations on non-federal lands within Alaska's national parks. *Sturgeon v. Masica*, 768 F.3d 1066, 1069-70 (9th Cir. 2014).

Sturgeon believed that federal law sheltered these non-federal areas from the reach of national park regulations. Although non-federal enclaves within the park system in other states are subject to such national regulations, the federal government has taken a different course with respect to Alaska, out of a special sensitivity for Alaska's and its native peoples' autonomy. ANILCA shields state, Native, and private land within "conservation system units" from Service regulations applicable "solely" to such units. 16 U.S.C. § 3103(c). The statutory phrase "conservation system unit" encompasses a variety of federally administered parks, refuges, and preserves in Alaska. *See id.* § 3102(3).

Sturgeon sued to establish that, under ANILCA, national park regulations cannot extend to navigable waters within conservation units. But the district court and the Ninth Circuit, indifferent to the unique

state-federal balance which ANILCA brokers, held that all nationwide national park regulations apply to every pocket of non-federal land within conservation system units. *Sturgeon*, 768 F.3d at 1070-71, 1077-78.

That holding reaches far beyond a single hovercraft traversing the Alaskan wilds. Federal conservation system units sprawl across a massive proportion of Alaska's lands and waters. Many Alaskans live in and rely upon state, private, and Native land within these units. Upholding the lower courts' authorization of federal power over these non-federal lands will hurt the livelihoods and recreational pursuits of all Alaskans.

This Court should reverse. The text and context of ANILCA protect non-federal enclaves within conservation units from National Park Service control. The Service's contrary position, which no reasonable construction of ANILCA supports, merits no deference from this Court.

ARGUMENT

I

THE PLAIN LANGUAGE OF ANILCA PRESERVES ALASKA'S PRIMACY OVER LAND AND WATER USE BY LIMITING THE REACH OF NATIONAL PARK SERVICE REGULATIONS TO FEDERAL LANDS

Statutory interpretation begins with the plain language of the statute. This Court relies on text to "give effect to the unambiguously expressed intent of Congress." *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 843 (1984). Judges look to the

ordinary meaning of statutory text and do not resort to legislative history unless the statute is ambiguous. *Mohamad v. Palestinian Authority*, 132 S. Ct. 1702, 1709 (2012); *Moskal v. United States*, 498 U.S. 103, 108 (1990).

ANILCA is not ambiguous. It preserves the land-use rights of the many state, Native, and private landowners that reside within the vast reaches of land and waterways otherwise dedicated as "conservation system units" by the federal government. ANILCA's ordinary meaning exempts non-federal lands within conservation system units from National Park Service regulation. ANILCA provides that only *federal* lands within the boundaries of such conservation system units "shall be deemed to be included as a portion of such unit." 16 U.S.C. § 3103(c). In contrast, lands that belong to "the State, to any Native corporation, or to any private party [are not] subject to the regulations applicable solely to public lands within such units."[2] *Id.* ANILCA then defines a "conservation system unit" as "any unit in Alaska of the National Park System," as well as certain other federally managed wilderness areas. *See id.* § 3102(4).

By its plain terms, Section 3103 of ANILCA establishes three common sense principles. Foremost, non-federal land within Alaska's federal conservation units are not part of those units. Second, land that is not part of a conservation system unit is not regulated as if it were. And third, if the federal government wants to regulate such non-federal areas as if they

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[2] These inholdings may, however, be conveyed to the federal government, after which "such lands shall become part" of the conservation system unit "and be administered accordingly." 16 U.S.C. § 3103(c).

were fully integrated into a conservation unit, then it must obtain title.

This basic framework protects non-federal land within these conservation system units from the normal Service regulatory regime. It also vindicates ANILCA's larger purpose of providing a unique, Alaska-specific framework for national parks. *See, e.g.*, 16 U.S.C. § 3101(d) ("This Act provides sufficient protection for . . . scenic, natural, cultural and environmental values . and at the same time . . . adequate opportunity for satisfaction of the economic and social needs of the State of Alaska and its people").

II

CANONS OF STATUTORY CONSTRUCTION CONFIRM THAT ANILCA DOES NOT EXPAND NATIONAL PARK SERVICE REGULATIONS TO STATE, NATIVE, AND PRIVATE LAND

A. The Context of § 3103(c) Demonstrates That Congress Intended for Non-Federal Lands Encased in Conservation System Units To Remain Free of Default National Park Service Regulations

Context shapes language and eliminates candidate interpretations. *Utility Air Regulatory Grp. v. E.P.A.*, 134 S. Ct. 2427, 2442 (2014). Context includes both the statutory section at issue and the larger enactment. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997).

Here, the immediate statutory context shows that, under ANILCA, the Service's default national park

regulations do not apply to non-federal property within conservation system units. The definition of "conservation system unit" is instructive. A "conservation system unit" is "*any* unit in Alaska of the National Park System." 16 U.S.C. § 3102(4) (emphasis added). Thus, any part of the National Park System is also part of a conservation system unit. ANILCA says that State, Native, and private lands are not part of any conservation system unit: they are not "deemed to be included as a portion of such unit" and "any such lands shall become part of the unit" only upon federal acquisition. 16 U.S.C. § 3103(c). Because non-federal lands are not part of the unit, they cannot be part of the national park system. Thus, national park regulations do not apply to them.

The broader context of the statutory scheme leads to the same conclusion. ANILCA placed over 100 million acres of Alaska within conservation system units. Andrea K. Hansen, *The Alaska National Interest Lands Conservation Act of 1980*, 22 J. Land Resources & Envtl. L. 435, 435 (2002). This unprecedented expansion of federal parks, preserves, and refuges presented a unique challenge to the federal-state balance of land management in Alaska. Because so much of Alaska's land and water is encased within these federal conservation areas, the fate of the state's many non-federal enclaves implicates the heart of the state's sovereignty.

ANILCA therefore remained solicitous of the interests of the state, Native corporations, and private property owners. Indeed, the law intended both to provide for the preservation of treasured landscapes and to protect Alaska's economy. ANILCA assures "adequate opportunity for satisfaction of the economic

and social needs of the State of Alaska and its people." 16 U.S.C. § 3101(d). For rural Alaskans, the Act offers the right to continue "a subsistence way of life." *Id.* § 3101(c). Contrary to Congress's intent, the Ninth Circuit's reading hollows out these promises by coating much of Alaska's non-federal land in layers of federal control.

For its part, the Ninth Circuit lost sight of context when it homed in on the word "solely" in Section 3103(c): "No lands which [belong] to the State, to any Native Corporation, or to any private party shall be subject to the regulations applicable solely to public lands within such units." 16 U.S.C. § 3103(c); *Sturgeon v. Masica*, 768 F.3d at1077-79. "Solely," said the Ninth Circuit, means that non-federal lands are freed only from the regulations that are specific to the Alaskan conservation system units. *Id.* at 1077-78. Nationwide national park regulations still hold sway. *Id.*

This reading ignores the rest of Section 3103(c). Non-federal lands inside conservation system units are not part of the national park system. Under the lower court's reading, non-federal lands within a conservation system unit become an uncertain hybrid—they are not part of the conservation system unit yet somehow remain within the national park system. This defies ANILCA's clear dictate that these non-federal lands are not part of the conservation system unit in which they sit. They therefore cannot be regulated as if they are. Thus, the Ninth Circuit's fixation on this single word "solely" violates the canon that courts should harmonize all parts of a statute. *See Weinberger v. Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 631-32 (1973).

But another reading of "solely" reconciles the

language in Section 3103(c): the word clarifies that Congress did not intend to exempt these pockets of non-federal land from all generally applicable federal laws, such as the Clean Water Act. In other words, Congress inserted the word "solely" to ensure that non-federal enclaves within conservation units would still be subject to the United States' general legislative jurisdiction. This reading, unlike the Ninth Circuit's, does not elevate a single word over the rest of the text.

The plain language of ANILCA says non-federal lands inside national parks are not part of the park system. This includes waters that run through such lands where non-federal parties own title to the submerged land. These lands and waters are free from all national park regulations.[3]

B. ANILCA Lacks Any Clear Statement of Intent To Trespass upon Alaska's Supremacy over Management of Non-Federal Land and Water

This Court protects federalism by presuming that Congress does not intend to alter it absent a plain statement. "[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance." *United States v.*

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[3] Below, the Service argued that all navigable waters within conservation units are themselves public lands subject to full Service regulation under ANILCA because of federal reserved water rights in Alaska waters. However, ANILCA's definition of "public lands" excludes waters in which the federal government does not hold title. *See* 16 U.S.C. § 3102. And for the reasons stated in the Petitioner's brief on the merits, no federal interest in any of those waters is sufficient to qualify them as federal lands under ANILCA.

Bass, 404 U.S. 336, 349 (1971). Primary jurisdiction over land and water belongs to the sovereign states. *See e.g., Hess v. Port Authority Trans-Hudson Corporation*, 513 U.S. 30, 44 (1994); *United States v. Alaska*, 521 U.S. 1, 5 (1997). Although national park regulations often apply to inholdings in other states, Alaska's sovereignty faces unique peril because of the staggering size of regions tagged as federal conservation areas. *See* Hansen, *supra* at 435 (ANILCA added "more than 100 million acres of conservation system units . more than doubling the size of the national park system, almost tripling the size of the wildlife refuge system, and nearly quadrupling the size of the national wilderness preservation system."). Congress would not commit matters of such political significance to agency hands with winks and nods.

Courts should presume that Congress does not intend to meddle with Alaska's sovereign interests in land and water regulation unless it speaks clearly. Under the Ninth Circuit's counter-intuitive reasoning, language that appears to preserve the federal-state balance brokered by ANILCA in fact tilts the scale toward federal control.

In fact, the Ninth Circuit beats ANILCA's ploughshare back into a sword by refashioning language designed to preserve a balanced federalism into a weapon that assaults the federalism embodied by the statute's compromise. "[I]n the absence of a clearer direction from Congress," this Court should read ANILCA as a modest recognition of Alaska's sovereignty over land and water. *Bass*, 404 U.S. at 339.

III

EVEN IF ANILCA IS AMBIGUOUS, THIS COURT SHOULD NOT DEFER TO THE NATIONAL PARK SERVICE'S INTERPRETATION

The National Park Service's interpretation of ANILCA subjecting non-federal lands and waters to federal control contradicts the statute and does not deserve this Court's deference. The National Park Service's views on its authority over non-federal enclaves have vacillated. In 1983, soon after ANILCA's passage, the National Park Service said that its regulations did not reach "privately owned lands and waters (including Indian lands and waters . . .) within the boundaries of a park area." 48 Fed. Reg. 30,252, 30,261 (June 30, 1983). This rule admitted of one exception for "regulations relating specifically to privately owned lands and waters under the legislative jurisdiction of the United States." *Id.* A 1987 revision affirmed and clarified the agency's position. The revision that said park regulations "do not apply on non-federally owned lands and waters or on Indian lands and waters owned individually or tribally within the boundaries of a park area." 52 Fed. Reg. 35,238, 35,239 (Sept. 18, 1987).

The National Park Service switched positions a decade later. A 1996 amendment extended national park regulations to "waters subject to the jurisdiction of the United States located within the boundaries of the National Park System, including navigable waters and the areas within their ordinary reach . . and without regard to the ownership of submerged lands, tidelands, or lowlands." 61 Fed. Reg. 35,133, 35,136 (July 5, 1996). The Service's interpretation differs

from the Ninth Circuit's. Whereas the Ninth Circuit held here that national park regulations apply across all non-federal inholdings, the Service's interpretation applies its regulations only to navigable waters within pockets of non-federal land.

Although the Service's interpretation is not as onerous as the Ninth Circuit's, it does not merit deference. ANILCA unambiguously shields Sturgeon and all Alaskans on all non-federal lands and waters from the reach of default national park regulations. Even without ANILCA's straightforward language, the regulation is an unreasonable interpretation.

A. The National Park Service's Patchwork Approach To Regulating Non-Federal Land and Water Is Not a Permissible Reading of the Statute

Chevron deference applies to "an agency's reasonable interpretation of an ambiguity in a statute that the agency administers." *Michigan v. EPA*, 135 S. Ct. 2699, 2701 (2015). A *Chevron* analysis poses two questions: (1) is the agency interpreting an ambiguous text?; and if so, (2) is the agency's interpretation reasonable? *Utility Air Regulatory Grp.*, 134 S. Ct. at 2439.

As discussed above, ANILCA's plain language is unambiguous. Non-federal lands shall not "be subject to the regulations applicable solely to public lands within such units." 16 U.S.C. § 3103(c). This phrase leaves no room for interpretive legerdemain.

Assuming arguendo that the language were ambiguous, the National Park Service's interpretation of ANILCA could not fit into any fair reading of the statute. Even under the deferential standard of

Chevron, courts must reject an unreasonable agency interpretation. *See Michigan v. EPA*, 135 S. Ct. at 2707.

The National Park Service's interpretation is unreasonable because it applies a non-uniform rule to a statute establishing a uniform standard for non-federal enclaves. Under the agency's interpretation, national park regulations apply to navigable waters within park boundaries "without regard to the ownership of submerged lands, tidelands, or lowlands." 36 C.F.R. § 1.2(a)(3). Otherwise, the agency recognizes that its regulations only reach "federally owned lands and waters administered by the National Park Service." *Id.* at § 1.2(a)(1). This means that some parts of non-federal enclaves are subject to park regulation and other parts are not.

The statute does not support this checkerboard interpretation. Rather, ANILCA contemplates uniform treatment of all non-federal lands and waters within conservation system units. Non-federal lands, which are not part of the surrounding conservation system unit, are exempt from regulations "applicable solely to public lands within such units." 16 U.S.C. § 3103. ANILCA explicitly defines "land" to mean both lands and waters. *Id.* § 3102(1). Thus, Congress intended that this exemption should apply to land *and* water within non-federal enclaves.

Even if Section 3103 were ambiguous regarding what regulations apply to non-federal lands and waters, the statute still would unambiguously apply the same rule to both non-federal lands and waters. In other words, nationwide park regulations either apply to all non-federal lands and waters within conservation units (as the Ninth Circuit held), or to none of them (as

Sturgeon contends). The lands and waters stand or fall together.

Yet the Service's interpretation treats land and water differently. *See* 36 C.F.R. § 1.2(a). The Service applies nationwide park regulations to water on non-federal land, but not to the rest of the enclave. The National Park Service's regulation that claims authority to regulate waters within conservation system units regardless of ownership of the submerged and surrounding land cannot be squared with any permissible reading of ANILCA.

B. This Court Should Not Defer to the National Park Service's Interpretation Because Other Federal Agencies Also Manage Conservation System Units Under ANILCA

Where multiple agencies share in administration of a statute, this Court should not defer to a single agency's interpretation. *See Bowen v. American Hosp. Ass'n*, 476 U.S. 610, 642 n.30 (1986); *see also Proffitt v. FDIC*, 200 F.3d 855, 860 (D.C. Cir. 2000). "Any other conclusion would produce an intolerable situation in which different agencies could adopt inconsistent interpretations of [a statute] and substantially complicate the administration of the Act." *Public Citizen Health Res. Grp. v. FDA*, 704 F.2d 1280, 1287 (D.C. Cir. 1983).

The National Park Service interpretation does not merit deference because other agencies also administer conservation system units in Alaska, and interpret Section 3103 differently. For example, the United States Fish and Wildlife Service manages National Wildlife Refuges in Alaska, which are included within

the definition of "conservation system unit." *See* 50 C.F.R. § 36.1; 16 U.S.C. § 3102(4). The Department of Agriculture and Forest Service also have imposed subsistence management regulations pursuant to ANILCA with regard to Alaska's conservation system units. *See* 36 C.F.R §§ 242.1-242.28.

The concurrent management of conservation system units in Alaska allows for diverging and even contradictory interpretations of ANILCA. Indeed, the United States Fish and Wildlife Service employs a different interpretation of its authority over non-federal land within conservation system units under its domain. That agency interprets its authority to extend only to "federally-owned lands within the boundaries of any Alaska National Wildlife Refuge." 50 C.F.R. § 36.1(b). The Fish and Wildlife Service thus leaves non-federal islands within wildlife refuges alone, while the National Park Service seeks to expand its authority to navigable waters on non-federal lands. Under such circumstances, a court should not favor any one agency and instead lean on its own judgment.

C. The Agency's Flip-Flop in Its Interpretation of ANILCA Extinguishes Any Remaining Persuasive Power

If *Chevron* does not apply, an agency regulation may sometimes enjoy persuasive power under the *Skidmore* deference: "We consider that the rulings, interpretations and opinions of [an agency], while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Skidmore v. Swift & Co.*, 323 U.S. 134, 139 (1944). However, the agency's

shifting interpretation weakens its persuasive grip.

The space afforded under *Chevron*'s discretion theory allows for changes in policy if the agency remains within the confines of its discretion. *Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967, 980-81 (2005). But, under *Skidmore*, policy changes undermine the level of deference due to the agency's interpretation.

This Court has frequently applied more scrutiny to agency interpretations because of policy shifts. Respect for agency interpretations under *Skidmore* depends upon whether the agency's position represents a "longstanding, consistently maintained interpretation." *Alaska Dep't of Envt'l Conservation v. E.P.A.*, 540 U.S. 461, 487 (2004). "An agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is entitled to considerably less deference than a consistently held agency view." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987) (internal quotation marks omitted); *see also Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 417 (1993). Moreover, deference diminishes with the span of time between the statute's enactment and the subsequent agency interpretation. *Pub. Citizen v. United States Dep't of Justice*, 491 U.S. 440, 463 n.12 (1989); *see also Good Samaritan*, 508 U.S. at 414.

Here, the National Park Service has changed its position regarding the reach of national park regulations. The agency's 1981 interim guidance provided that national park regulations "would not apply to activities occurring on State lands [or] activities occurring on Native or any other non-federally owned land interests located within park area

boundaries." 46 Fed. Reg. 31,836, 31,843 (June 17, 1981). The Service clarified again in 1987 that its regulations "do not apply on non-federally owned lands and waters or on Indian lands and waters owned individually or tribally within the boundaries of a park area." 52 Fed. Reg. at 35,239.

The agency then upgraded its own regulatory power in 1996. The new policy extended national park regulations to waters inside park boundaries "without regard to the ownership of submerged lands, tidelands, or lowlands." 61 Fed. Reg. at 35,136.

This shift in position blunts the agency's persuasive power. If any agency interpretation ought to persuade this Court, it is the interpretation closest in time to enactment. That interpretation said that the National Park Service cannot impose its regulations on non-federal lands within Alaska's national parks. This earlier policy also accords with ANILCA's plain language.

CONCLUSION

ANILCA offers a balance between federal conservation and Alaskans' autonomy. This compromise acknowledges the great national interest in Alaska's natural treasures, while also acknowledging the special solicitude that should accompany such national interest. The National Park Service seeks to disrupt that balance by subjecting the many islands of non-federal land within Alaska's national parks to its full regulatory jurisdiction. But ANILCA dictates that such lands should remain just as free of federal control as lands far from any national park boundary. The National Park Service cannot unilaterally deem it otherwise.

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BERT FROST, IN HIS OFFICIAL CAPACITY AS ALASKA REGIONAL DIRECTOR OF THE NATIONAL PARK SERVICE, *et al.*,

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS..... i

TABLE OF CITED AUTHORITIES ii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF THE ARGUMENT..... 3

ARGUMENT.....5

A. This Court Must Avoid an Interpretation of Law that Would Yield Absurd Results.....5

B. The NPS's Exercise of Authority Over Waters Within CSU Boundaries, Through a Nationwide Regulation, Deprives Hunters of Access to Hunting Opportunities 10

C. The District Court and Ninth Circuit Rulings Deprive Hunters of Aircraft Access to Hunting Opportunities 11

CONCLUSION 20

TABLE OF CITED AUTHORITIES

Page

CASES

Haggar Co. v. Helvering,
308 U.S. 389 (1940) 5

McNary v. Haitian Refugee Ctr., Inc.,
498 U.S. 479 (1991) 5

Perry v. Commerce Loan Co.,
383 U.S. 392 (1966) 6

Pub. Citizen v. Dep't of Justice,
491 U.S. 440 (1989) 6

Rowland v. Cal. Men's Colony, Unit II Men's Advisory Council,
506 U.S. 194 (1993) 5

Safari Club Int'l et al. v. Demientieff et al.,
No. 98–0414 (D. Alaska, HRH) 1

United States v. Am. Trucking Ass'ns.,
310 U.S. 534 (1940) 6

STATUTES AND OTHER AUTHORITIES

16 U.S.C. § 3102(4) 2

16 U.S.C. § 3103(c) ..... *passim*

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Page

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Page

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Sup. Ct. R. 37 1

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Page

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INTEREST OF *AMICUS CURIAE*[1]

Safari Club International ("Safari Club") is a nonprofit corporation incorporated in the State of Arizona, operating under § 501(c)(4) of the Internal Revenue Code, with principal offices and places of business in Tucson, Arizona and Washington, D.C. and a membership of approximately 48,000. Safari Club's missions are the conservation of wildlife, protection of the hunter, and education of the public concerning hunting and its use as a conservation tool. Safari Club carries out its conservation mission in part through its sister organization, Safari Club International Foundation.

Safari Club has long been involved in litigation and other advocacy efforts to promote hunting, access to hunting, and sustainable-use conservation, including hunting opportunities on federal and other lands in Alaska. For almost a decade, Safari Club pursued litigation to challenge the Federal Subsistence Board's administration of subsistence priorities for hunting and wildlife resources on federal lands in Alaska and the composition of the federal advisory councils that provided recommendations on the allocation of those priorities. *Safari Club Int'l et al. v. Demientieff et al.* No. 98–0414 (D. Alaska, HRH).

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1. The following is provided pursuant to Supreme Court Rule 37. No counsel for a party authored this brief in whole or in part, and no counsel for a party and no party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than named *amicus curiae* made a monetary contribution to this brief. Counsel of Record for Petitioner consented to the filing of *amicus curiae* briefs in support of either or of neither party. Counsel of Record for Respondents has consented to the filing of this brief.

In addition, Safari Club has participated or is currently participating in lawsuits involving, among other things, the listing and delisting of numerous species under the Endangered Species Act, states' authority and ability to manage wildlife populations via hunting, the U.S. Forest Service's application of the Roadless Rule on National Forest System lands, and the ability of hunters to import sport-hunted trophies into the U.S. from international hunts.

In this amicus brief, Safari Club will "bring[] to the attention of the Court relevant matter not already brought to its attention by the parties." Sup. Ct. R. 37(1). This brief provides information that will "be of considerable help to the Court." *Id.* This brief includes the view of both resident and nonresident hunters who enjoy Alaska's world-class hunting resources and opportunities and who require transportation on the waters that exist within the boundaries of Conservation System Units ("CSUs") administered by the Respondent National Park Service ("NPS").[2] Access to hunting areas and opportunities is of primary concern to Safari Club, its members, and many other hunters throughout the United States and the world.

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2. CSUs in Alaska include "any unit in Alaska of the National Park System, National Wildlife Refuge System, National Wild and Scenic Rivers Systems, National Trails System, National Wilderness Preservation System, or a National Forest Monument including existing units, units established, designated, or expanded by or under the provisions of [the Alaska National Interest Lands Conservation Act of 1980], additions to such units, and any such unit established, designated, or expanded hereafter." 16 U.S.C. § 3102(4); *see also* John Sturgeon's Opening Brief at 5 n.1. For the purposes of this brief, all references to CSUs include only those CSU lands administered by the NPS.

In Alaska, hunters often face significant obstacles to access hunting areas due to limited road coverage and the isolated nature of many valued hunting locations. Access to those opportunities depends upon hunters' ability to use all means of travel on rivers and other navigable waters in CSUs in Alaska. Safari Club and its members, along with the hunting community generally, seek to protect the full range of hunting and sustainable-use conservation opportunities available in Alaska.

SUMMARY OF THE ARGUMENT

Safari Club agrees with the arguments presented in the Opening Brief filed by Petitioner John Sturgeon. The plain meaning of Section 103(c) (16 U.S.C. § 3103(c)) of the Alaska National Interest Lands Conservation Act ("ANILCA") prohibits the application of NPS regulations to activities conducted on non-federal lands and waters located within CSUs in Alaska. Any statutory interpretation of Section 103(c) to the contrary would lead to an absurd result – one that would impose, through application of a nation-wide regulation, different use requirements for non-federal lands and waters within the CSUs than for lands and waters properly administered by the federal government and subject to Alaska-specific land use regulations. For this reason, even if Section 103(c)'s language *could* be read to impose such restrictions on activities taking place on non-federal lands and waters, this Court should follow fundamental statutory construction principles that require the avoidance of such nonsensical interpretations. Accepting Sturgeon's interpretation will achieve this goal.

Safari Club files this amicus brief in support of Sturgeon because this Court's ruling will extend far beyond John Sturgeon's personal hovercraft use. The Court's interpretation of ANILCA Section 103(c) will decide whether hunters, guides, and outfitters, many of whom are Safari Club members, will be able to access congressionally-mandated recreational activities available within and outside the boundaries of federal lands in Alaska.

The ability to access hunting areas is essential to the hunter. In Alaska, hunting opportunities are often found in isolated, difficult to reach places, to which there is no road access. A viable, and often the most viable, means of access to hunting locations is air travel by float plane. The NPS's decision, upheld by both the federal district court in Alaska and the Ninth Circuit Court of Appeals, that the NPS has the authority to regulate activity on the non-federal waters that exist within CSU boundaries through nation-wide regulations, poses a severe threat to all who wish to hunt in these inaccessible locations. The NPS's interpretation of Section 103(c) triggers the application of 36 C.F.R. § 2.17(a) and its prohibition against the use of aircraft on waters to non-federal waters in Alaska's CSUs. The regulatory ban against float planes landing on the majority of those waters will make it impossible for both resident and non-resident hunters and their guides to reach many hunting locations within and around CSUs, including many National Preserves. Despite the fact that Congress mandated the authorization of hunting in Alaska's National Preserves, the NPS has thwarted Congress's directive by applying regulations in a way that undermines hunters' abilities to access and use National Preserves for hunting.

ARGUMENT

A. This Court Must Avoid an Interpretation of Law that Would Yield Absurd Results

Petitioner Sturgeon correctly asserts that the plain meaning of ANILCA Section 103(c) prohibits the application of NPS regulations, including those intended for use nation-wide throughout the National Park System, to control and/or restrict conduct on non-federal lands and waters located within Alaska CSU boundaries. Sturgeon asks this Court to adopt an interpretation that avoids the illogical scenario in which the NPS must impose greater, and less Alaska-specific, requirements for the use of lands and waters outside of their authority than on the very lands and waters Congress directed them to administer.

When this Court determines the meaning of a statutory phrase it does so with the assumption that Congress is aware that the Court will avoid an interpretation that leads to absurd results. *Haggar Co. v. Helvering*, 308 U.S. 389, 394 (1940). "It is presumable that Congress legislates with knowledge of our basic rules of statutory construction . . . ." *Rowland v. Cal. Men's Colony, Unit II Men's Advisory Council*, 506 U.S. 194, 200-01 (1993) quoting *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 496 (1991). This Court must assume that, in its drafting of ANILCA, Congress did not intend the law to authorize illogical results.

Throughout this litigation, the NPS has disagreed with Sturgeon's interpretation, asserting instead that the plain meaning of Section 103(c) is exactly the opposite. Even if the Court were to give some credit to the NPS's

interpretation of the law's plain meaning, this Court cannot adopt such an interpretation because it would lead to an absurd result – the NPS having authority to impose different and potentially stricter and less Alaska-specific use restrictions on non-federal lands and waters than they impose on federal lands and waters administered by the agency. In such a case, the Court is required to "look beyond the words" of the statute:

> There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning. When that meaning has led to absurd or futile results, however, this Court has looked beyond the words to the purpose of the act.

United States v. Am. Trucking Ass'ns., 310 U.S. 534, 543 (1940) (Court interpreted term "employee" to determine power of ICC to establish requirements for qualifications and standards for employees of motor carriers) (internal citations omitted); *see also Perry v. Commerce Loan Co.*, 383 U.S. 392, 400 (1966); *Pub. Citizen v. Dep't of Justice*, 491 U.S. 440, 454, (1989) (Court acknowledged its obligation to look beyond statutory language when plain meaning of text leads to "odd result").

In his Opening Brief, Sturgeon pointed out that if the NPS adopted an Alaska-specific regulation allowing the use of personal hovercrafts, "then State, Alaska Native, and private lands within those parks would, paradoxically,

remain subject to the more restrictive nationwide rule." Petitioner Br. at 32. As Sturgeon explains, under this scenario, the NPS's interpretation of Section 103(c) would lead to an absurd result by subjecting federal waters to the specific, permissive regulation, but non-federal waters to the more restrictive nation-wide rule.

The nonsensical scenario described in Sturgeon's Opening Brief currently extends to fishing on National Park units in Alaska, as a result of recently adopted NPS regulations. The NPS recently finalized new rules that allow a method of fishing on federal land within CSU boundaries in Alaska that is prohibited elsewhere by a separate nationally-applicable NPS regulation.[3] The Alaska-specific regulation provides that the "[u]se of species native to Alaska as bait for fishing is allowed in accordance with non-conflicting State law and regulations." 36 C.F.R. § 13.40; 80 Fed. Reg. 64325, 64343 (Oct. 23, 2015). The NPS explains in the preamble that the new regulation:

> Allows the use of native species as bait, commonly salmon eggs, for fishing in accordance with applicable federal and non-conflicting State law. This supersedes for park areas in Alaska the National Park System-wide prohibition on using certain types of bait in 36 CFR 2.3(d)(2).

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3. While the NPS's new regulations relate primarily to restricting certain hunting methods in Park Service lands in Alaska, this one provision authorizes a method of fishing that is prohibited by regulations applicable throughout the National Park System.

80 Fed. Reg. at 64327.[4]

The NPS's statutory interpretation of Section 103(c) would yield the absurd result that the use of native fish species as bait would be allowed on federally-owned lands and waters within the boundaries of a CSU in Alaska, but not on non-federal lands and waters (*i.e.*, State, Alaska Native, and private) located within the same unit. For example, an angler fishing in a National Preserve in Alaska could use native fish as bait on a federal lake but could not use such bait if fishing in a nearby non-federal river.[5] This nonsensical statutory interpretation defies statutory construction principles.

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4. The nationally-applicable regulation, Section 2.3(d)(2) prohibits:

> Possessing or using as bait for fishing in fresh waters, live or dead minnows or other bait fish, amphibians, nonpreserved fish eggs or fish roe, except in designated waters. Waters which may be so designated shall be limited to those where nonnative species are already established, scientific data indicate that the introduction of additional numbers or types of non-native species would not impact populations of native species adversely, and park management plans do not call for elimination of non-native species.

36 C.F.R. § 2.3.

5. The Preserve at issue in this case, the Yukon-Charley Rivers National Preserve, contains numerous lakes, presumably at least some of which are non-navigable and owned by the NPS. *See* Annual Report 2006, http://home.nps.gov/yuch/learn/management/upload/2006_YUCH_Annual_Report.pdf (describing numerous lakes within Preserve) (visited Nov. 18, 2015).

Instead, the only reasonable interpretation of Section 103(c) is that the nationally-applicable fishing regulation should apply solely to NPS administered *federal* lands and waters other than those lands and waters subject to Alaska specific regulations. The nationally-applicable NPS fishing regulations, like the Alaska-specific fishing regulations, would not apply to State, Alaska Native, and private lands and waters within CSU's in Alaska. Fishing activities conducted on State, Alaska Native and private lands and waters within the CSU would be governed by Alaska State regulations.

The NPS's interpretation of Section 103(c) would lead to a similarly absurd outcome in regard to the collection of berries and/or firewood on the shores of waters within CSU boundaries. An Alaska-specific regulation authorizes the collection of "natural plant food items, including fruits, berries and mushrooms," 36 C.F.R. § 13.35(c)(1)[6] and "[d]ead wood on the ground for use as fuel for campfires within the park area" on most park areas in Alaska, *id.* § 13.35(c)(4). A different regulation, applicable to National Park units nation-wide, prohibits the removal or possession of "[p]lants or the parts or products thereof," 36 C.F.R. § 2.1(a)(1)(ii), and "[u]sing or possessing wood gathered from within the park area," *id.* § (a)(4). If the NPS's interpretation of Section 103(c) would apply, an individual would be permitted to collect berries, and/or firewood on federal lands within a CSU, but could not do so on State, Alaska Native and private lands within

6. The regulation gives the superintendent of the Park unit discretion to authorize some gathering where he determines it will not adversely affect park wildlife or resources. 36 C.F.R. § 13.35(c)(1).

the same CSU boundaries. The NPS would be imposing greater (and less Alaska-specific) restrictions on lands that they do not own or administer than on the lands under their statutory authority. This Court should not accept an interpretation that leads to such an irrational outcome.

B. The NPS's Exercise of Authority Over Waters Within CSU Boundaries, Through a Nationwide Regulation, Deprives Hunters of Access to Hunting Opportunities

Petitioner John Sturgeon filed suit in federal district court in Alaska to challenge the NPS's exercise of authority to prohibit Sturgeon from operating his hovercraft on navigable waters flowing within the boundaries of the Yukon-Charley Rivers National Preserve. Sturgeon, a hunter, used his hovercraft to travel to favored moose hunting locations in Alaska. The authority that Sturgeon challenges, and that the district court and Ninth Circuit each upheld, impacts far more than his ability to visit a moose hunting area or even the ability of hunters generally to use hovercrafts within the boundaries of CSUs in Alaska. This authority threatens the ability of hunters and guides generally throughout Alaska to access hunting opportunities located both inside and outside the boundaries of CSUs managed by the NPS. Unless this Court rejects the district court and Ninth Circuit's interpretation of the NPS's authority to regulate activity on non-federal lands and waters within CSU boundaries, hunters will be deprived of essential means of transportation to the remote hunting opportunities in and near many of the lands administered by the NPS in Alaska.

C. The District Court and Ninth Circuit Rulings Deprive Hunters of Aircraft Access to Hunting Opportunities

Float planes, because they can land on water, provide an essential means of transportation for hunters in Alaska. The use of float planes in CSUs is at risk because of the rulings in this case. The Ninth Circuit, affirming the ruling of the district court, upheld the NPS's asserted authority, to regulate activities on

> navigable waters and areas within their ordinary reach (up to the mean high water line in places subject to the ebb and flow of the tide and up to the ordinary high water mark in other places) and without regard to the ownership of submerged lands, tidelands, or lowlands

36 C.F.R. § 1.2(a)(3). Not only would that authority enable the NPS to prohibit the use of hovercrafts on such waters within the boundaries of CSUs administered by the NPS, but pursuant to 36 C.F.R. § 2.17(a), it would also result in the prohibition against the use of most types of aircraft on those waters:

> (a) The following are prohibited:
>
> (1) Operating or using aircraft on lands or waters other than at locations designated pursuant to special regulations.

Id. § 2.17(a).

A prohibition on aircraft use of waters within CSU boundaries has a major impact on hunter access to hunting opportunities in Alaska. The NPS administers approximately 43,522,000 acres of CSU lands in the State. 16 U.S.C. §§ 410hh, 410hh-1. Almost half of those lands were established under ANILCA as National Preserves, including the Anakchak (~ 367,000 acres), Bering Land Bridge (~ 2,457,000 acres), Denali (~ 1,330,000 acres), Gates of the Arctic (~ 900,000 acres), Glacier Bay (~ 57,000 acres), Katmai (~ 308,000 acres), Lake Clark (~ 1,214,000 acres), Noatak (~ 6,460,000 acres), Wrangell-St. Elias (~ 4,117,000 acres), and Yukon-Charley Rivers National Preserves (~ 1,713,000 acres) (totaling ~ 18,923,000 acres). *Id.* National Preserves are a major component of the lands in Alaska open to hunting.

Alaska's National Preserves, like many lands in the State, are actively hunted. Congress specifically mandated that the NPS authorize hunting on National Preserves in Alaska.

> A National Preserve in Alaska shall be administered and managed as a unit of the National Park System in the same manner as a national park except as otherwise provided in this Act and except that the taking of fish and wildlife for sport purposes and subsistence uses, and trapping ***shall be allowed in a national preserve*** under applicable State and Federal law and regulation.

16 U.S.C. § 3201 (emphasis added); *see also* 36 C.F.R. § 13.40(d).

Although Alaska's National Preserves are open to hunting, access to that hunting can be difficult. Few roads run through or access all areas of those Preserves. Several of the National Preserves cannot be reached by road at all. For example, boats and aircraft provide the only access to Katmai National Park and Preserve. "Hunting and trapping within Katmai National Preserve requires extensive planning. Access in most cases will involve air taxi service via float plane from King Salmon or one of the other surrounding villages." NATIONAL PARK SERVICE, KATMAI, SPORT HUNTING AND TRAPPING, http://www.nps.gov/katm/planyourvisit/hunting.htm (last visited Nov. 19, 2015). Similarly, no roads lead into Gates of the Arctic National Park. "Most visitors access the park by air taxi, in small aircraft equipped with floats or tundra tires." NATIONAL PARK SERVICE, GATES OF THE ARCTIC, DIRECTIONS, http://www.nps.gov/gaar/planyourvisit/directions.htm (last visited Nov. 19, 2015).

Hunters need to be able to land float planes on the waters running through National Preserves to reach the bear, moose, caribou, sheep, goat and other species that Congress directed the NPS to make available to them to hunt. The NPS's regulation, 36 C.F.R. § 2.17, if broadly extended to all non-federal waters running through National Preserves by 36 C.F.R. § 1.2, could largely prohibit the use of aircraft on those waters. With diminished ability to reach those hunting opportunities by float plane, hunters will lose the access they require to participate in the National Preserve hunting that Congress mandated.

The world-class hunting opportunities in Alaska are not only important to Alaska residents, but to the residents

of all the states (and other countries). Nonresidents flock to Alaska to experience some of the best hunting in the world.[7] As the Alaska Department of Fish and Game ("Department") explains:

> Alaska's hunting reputation is justly deserved. One-fifth the size of the entire United States, Alaska offers wilderness hunting opportunities found in few other locations in the world. It is true that huge moose occur here and that vast caribou herds dominate the landscape in some areas and seasons. Numerous mountain ranges support populations of Dall sheep and mountain goats, and Sitka black-tailed deer thrive in the coastal forests. Once extirpated from the state, muskox now range over the western and arctic coastal wilderness. Large numbers of black and brown bear also exist here. And wolves, which are found across most of the state, are also abundant in some areas.

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7. While *amicus curiae* Safari Club is a hunting/conservation organization, many of its members also enjoy or make their livelihoods from fishing. Like hunting, fishing is extremely popular in Alaska. The estimated number of anglers in Alaska in 2014 was 470,470 and the number of angler-days fished in Alaska in 2014 was 2,309,853. Alaska Sport Fishing Survey, Statewide, ALASKA DEPARTMENT OF FISH AND GAME, http://www.adfg.alaska.gov/sf/sportfishingsurvey/index.cfm?ADFG=region.home (use the "Get Data" button in the "Regional Effect Summary" box to access charts containing these figures) (last visited Nov. 19, 2015). As the Department states "[g]ood sport fishing isn't hard to find in Alaska. In fact, in this land of 3,000 rivers, 3 million lakes and 6,640 miles of coastline, a sport fisher's greatest challenge can be deciding where to get started." ALASKA DEPARTMENT OF FISH AND GAME, SPORT FISHERIES, http://www.adfg.alaska.gov/index.cfm?adfg=fishingSport.main (last visited Nov. 19, 2015).

ALASKA DEPARTMENT OF FISH AND GAME, INTRODUCTION TO ALASKA BIG GAME HUNTING, http://www.adfg.alaska.gov/index.cfm?adfg=hunting.biggameintro (last visited Nov. 19, 2015). Because of its climate and terrain, Alaska offers some of the most challenging hunting in the United States. *Id.* The Department describes some of the animals that Alaska residents and nonresidents hunt:

- "Hunting is used to manage the size of these herds, and bison hunts are among the most popular drawing hunts in Alaska." ALASKA DEPARTMENT OF FISH AND GAME, BISON HUNTING IN ALASKA, http://www.adfg.alaska.gov/index.cfm?adfg=bisonhunting.main (last visited Nov. 19, 2015).

- "Alaska has an estimated 30,000 brown bears statewide. In 2007, about 1,900 brown bears were harvested in Alaska. Of that figure, about 700 were taken by Alaska residents and roughly 1,200 (or 67 percent) were taken by nonresidents." ALASKA DEPARTMENT OF FISH AND GAME, BROWN/GRIZZLY BEAR HUNTING IN ALASKA, http://www.adfg.alaska.gov/index.cfm?adfg=brown bearhunting.main (last visited Nov. 19, 2015).

- "On average, people harvest about 22,000 caribou in Alaska each year." ALASKA DEPARTMENT OF FISH AND GAME, CARIBOU HUNTING IN ALASKA, http://www.adfg.alaska.gov/index.cfm?adfg=caribouhunting.main (last visited Nov. 19, 2015).

- "Alaska's Dall sheep are popular with nonresident hunters, and the harvest is split fairly evenly between residents and nonresidents. In 2007,

for example, nonresidents took 403 sheep, while resident hunters took 513, or about 57 percent." ALASKA DEPARTMENT OF FISH AND GAME, DALL SHEEP HUNTING IN ALASKA, http://www.adfg.alaska.gov/index.cfm?adfg=sheephunting.main (last visited Nov. 19, 2015).

- "Between 1987 and 2007, an average annual harvest of about 12,330 deer has occurred in Alaska." ALASKA DEPARTMENT OF FISH AND GAME, SITKA BLACK-TAILED DEER HUNTING IN ALASKA, http://www.adfg.alaska.gov/index.cfm?adfg=deerhunting.main (last visited Nov. 19, 2015).

- "Alaskans and nonresidents annually harvest 6,000 to 8,000 moose, which translates into about 3.5 million pounds of usable meat." ALASKA DEPARTMENT OF FISH AND GAME, MOOSE HUNTING IN ALASKA, http://www.adfg.alaska.gov/index.cfm?adfg=moosehunting.main (last visited Nov. 19, 2015).

- "In 2007, 518 mountain goats were harvested in Alaska, 158 by nonresidents (about 30 percent) and 360 by resident hunters." ALASKA DEPARTMENT OF FISH AND GAME, GOAT HUNTING IN ALASKA, http://www.adfg.alaska.gov/index.cfm?adfg=goathunting.main (last visited Nov. 19, 2015).

- "Whether decoying brant over eel grass beds at Cold Bay, jump-shooting dabblers on Minto Flats, or waiting in a pit blind for a crack at

> speckle bellies in Delta, the variety of bird species hunted and the diversity of hunting venues are unique to the state. . . . If you are new to the state or a non-resident, you may feel that hiring a Migratory Bird Hunting Guide would be a good way to go." There are "[a]pproximately 8,800 waterfowl hunters in Alaska . . . ." ALASKA DEPARTMENT OF FISH AND GAME, WATERFOWL HUNTING IN ALASKA, http://www.adfg.alaska.gov/index.cfm?adfg=waterfowlhunting.main (last visited Nov. 19, 2015).

- "Wolves may be harvested with a hunting license and/or a trapping license. Nonresident wolf tags are only $30 . . . ." ALASKA DEPARTMENT OF FISH AND GAME, WOLF HUNTING IN ALASKA, http://www.adfg.alaska.gov/index.cfm?adfg=wolfhunting.opportunities (last visited Nov. 19, 2015).

In addition to being extremely popular, hunting supports Alaska's economy and provides a living to many guides and outfitters, who mainly cater to nonresidents. Hunting also benefits others who provide services to the out-of-state visitors. As described in the report *Economic Impacts of Guided Hunting in Alaska,* prepared by the McDowell Group, Inc. for the Alaska Professional Hunters Association, (February 2014):

> In 2012, guides contracted with 3,207 hunters, 3,055 of them nonresidents. In total, hunters spent $51 million on guided hunts. Of the total, nonresident hunters spent an estimated $48 million. In addition to hunting packages, non-resident hunters and their companions

> spent another $3.5 million on lodging, food and beverage, clothing, souvenirs, and outdoor equipment, among other purchases while in Alaska. Dollars spent in Alaska by non-residents provides new dollars that help support the state's economy.
>
> Including $29.5 million in direct and indirect (multiplier effects) associated with this spending, guided hunting in Alaska accounted for $78 million in total economic activity in 2012.

The McDowell Group, *The Economic Impacts of Guided Hunting in Alaska*, 1 (February 2014), http://alaskaprohunter.org/Economic_Impacts_of_Guided_Hunting_Final.pdf (last visited Nov. 19, 2015). The report also noted that a significant percentage of the guided hunting occurred on federal lands, including NPS lands:

> Contracting guides reported that . . . [a]lmost half of revenue was earned hunting on federal lands, including US Fish and Wildlife Service (22 percent), US Forest Service (11 percent), ***NPS (9 percent)***, and BLM (4 percent). Eight percent was derived from private land (including Alaska Native Corporation land)."

Id. at 9 (emphasis added). As examples of some of the opportunities available in NPS lands in Alaska, the following outfitters offer guided hunts for desirable big game species: Alaska Remote Guide Service (brown/black bear, moose, and dall sheep in Denali National Preserve), http://www.alaskaremote.com/denali.htm (last visited Nov. 19, 2015); Wrangell Outfitters (moose

hunts in Wrangell, St. Elias National Preserve), http://www.wrangelloutfitters.com/guided-hunts/alaska-moose-hunting/ (last visited Nov.19, 2015); Mountain Monarchs of Alaska (grizzly bear, moose, caribou and Dall sheep in Noatak National Preserve), http://www.mountainmonarchs.com/western-arctic-moose-grizzly-bear-caribou-guide-service.html (last visited Nov. 19, 2015). The outcome of this case will affect all of these world-class hunting and fishing opportunities.

CONCLUSION

Safari Club asks this Court to reverse the rulings of the Ninth Circuit and district court and to interpret ANILCA Section 103(c) in accordance with the plain meaning of its statutory language and in a way that does not produce a nonsensical result under which the NPS will impose different and potentially greater use restrictions on State, Alaska Native, and private lands than on federal lands.

Safari Club seeks a ruling from this Court that will prevent the NPS from having the ability to exercise authority over the use of non-federal lands and waters within CSUs in ways that will make it more difficult, if not impossible, for hunters to travel to valued hunting sites and enjoy Alaska's wildlife resources.

Respectfully submitted,

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No. 14-1209

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IN THE

Supreme Court of the United States

JOHN STURGEON,

Petitioner,

v.

SUE MASICA, IN HER OFFICIAL CAPACITY AS ALASKA REGIONAL DIRECTOR OF THE NATIONAL PARK SERVICE, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICUS CURIAE* SAFARI CLUB INTERNATIONAL IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF CITED AUTHORITIES ii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF THE ARGUMENT 3

ARGUMENT 4

A. Respondents' Exercise of Authority Over Waters Within CSU Boundaries Deprives Hunters of Access to Hunting Opportunities 5

B. The District Court and Ninth Circuit Rulings Deprive Hunters of Aircraft Access to Hunting Opportunities 6

C. The Restrictions on Access to Hunting Impact Hunters from Throughout the U.S. and the World 9

CONCLUSION 14

TABLE OF CITED AUTHORITIES

Page

CASES

Safari Club International et al. v. Demientieff et al., No. 98–0414 (D. Alaska, HRH) 1-2

STATUTES AND AUTHORITIES

Sup. Ct. R. 10(c) 4

Sup. Ct. R. 37 1

Sup. Ct. R. 37(1) 2

16 U.S.C. § 410hh 7

16 U.S.C. § 410hh-1 7

16 U.S.C. § 3102(4) 3

16 U.S.C. § 3103(c) 4

16 U.S.C. § 3201 7

36 C.F.R. § 1.2 ..... 4, 8

36 C.F.R. § 1.2(a)(3) 6

36 C.F.R. § 2.17 ..... 4, 8

36 C.F.R. § 2.17(a) 6

Cited Authorities

Page

36 C.F.R. § 1340(d) 7

I.R.S. Code § 501(c)(4) 1

ALASKA DEPARTMENT OF FISH AND GAME, BISON HUNTING IN ALASKA, http://www.adfg.alaska.gov/index.cfm?adfg=bisonhunting.main 10

ALASKA DEPARTMENT OF FISH AND GAME, BROWN/GRIZZLY BEAR HUNTING IN ALASKA, http://www.adfg.alaska.gov/index.cfm?adfg=brownbearhunting.main 10

ALASKA DEPARTMENT OF FISH AND GAME, CARIBOU HUNTING IN ALASKA, http://www.adfg.alaska.gov/index.cfm?adfg=caribouhunting.main 11

ALASKA DEPARTMENT OF FISH AND GAME, DALL SHEEP HUNTING IN ALASKA, http://www.adfg.alaska.gov/index.cfm?adfg=sheep hunting.main 11

ALASKA DEPARTMENT OF FISH AND GAME, GOAT HUNTING IN ALASKA, http://www.adfg.alaska.gov/index.cfm?adfg=goathunting.main 12

ALASKA DEPARTMENT OF FISH AND GAME, INTRODUCTION TO ALASKA BIG GAME HUNTING, http://www.adfg.alaska.gov/index.cfm?adfg=hunting.biggameintro 10

Cited Authorities

Page

ALASKA DEPARTMENT OF FISH AND GAME, MOOSE HUNTING IN ALASKA, http://www.adfg.alaska.gov/index.cfm?adfg=moosehunting.main.....11

ALASKA DEPARTMENT OF FISH AND GAME, SITKA BLACK-TAILED DEER HUNTING IN ALASKA, http://www.adfg.alaska.gov/index.cfm?adfg=deerhunting.main.....11

ALASKA DEPARTMENT OF FISH AND GAME, SPORT FISHERIES, http://www.adfg.alaska.gov/index.cfm?adfg=fishingSport.main.....9

ALASKA DEPARTMENT OF FISH AND GAME, WATERFOWL HUNTING IN ALASKA, http://www.adfg.alaska.gov/index.cfm?adfg=waterfowlhunting.main 12

ALASKA DEPARTMENT OF FISH AND GAME, WOLF HUNTING IN ALASKA, http://www.adfg.alaska.gov/index.cfm?adfg=wolfhunting.opportunities 12

Alaska Sport Fishing Survey, Statewide, ALASKA DEPARTMENT OF FISH AND GAME, http://www.adfg.alaska.gov/sf/sportfishingsurvey/index.cfm?ADFG=region.home 9

NATIONAL PARK SERVICE, GATES OF THE ARCTIC, DIRECTIONS, http://www.nps.gov/gaar/planyourvisit/directions.htm.....8

Cited Authorities

Page

NATIONAL PARK SERVICE, KATMAI, SPORT HUNTING AND TRAPPING, http://www.nps.gov/katm/planyourvisit/hunting.htm 8

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INTEREST OF *AMICUS CURIAE*[1]

Safari Club International ("Safari Club") is a nonprofit corporation incorporated in the State of Arizona, operating under § 501(c)(4) of the Internal Revenue Code, with principal offices and places of business in Tucson, Arizona and Washington, D.C. and a membership of approximately 50,000. Safari Club's missions are the conservation of wildlife, protection of the hunter, and education of the public concerning hunting and its use as a conservation tool. Safari Club carries out its conservation mission in part through its sister organization, Safari Club International Foundation.

Safari Club has long been involved in litigation and other advocacy efforts to promote hunting, access to hunting, and sustainable-use conservation, including hunting opportunities on federal lands in Alaska. For almost a decade, Safari Club pursued litigation to challenge the Federal Subsistence Board's administration of subsistence priorities for hunting and wildlife resources on federal lands in Alaska and the composition of the federal advisory councils that provided recommendations on the allocation of those priorities. *Safari Club International*

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1. The following is provided pursuant to Supreme Court Rule 37. No counsel for a party authored this brief in whole or in part, and no counsel for a party and no party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than named *amicus curiae* made a monetary contribution to this brief. Counsel of Record for Petitioner consented to the filing of *amicus curiae* briefs in support of either or of neither party. Counsel of Record for Respondents consented to the filing of this brief after receiving timely written notice from the *amicus curiae*.

et al. v. Demientieff et al. No. 98–0414 (D. Alaska, HRH). In addition, Safari Club has participated or is currently participating in lawsuits involving, among other things, the listing and delisting of numerous species under the Endangered Species Act, states' authority and ability to manage wildlife populations via hunting, the U.S. Forest Service's application of the Roadless Rule on National Forest System lands, and the ability of hunters to import sport-hunted trophies into the U.S. from international hunts.

In this amicus brief, Safari Club will "bring[] to the attention of the Court relevant matter not already brought to its attention by the parties." Sup. Ct. R. 37(1). This brief provides information that will "be of considerable help to the Court." *Id.* Safari Club will not address the merits of the claims or legal arguments, especially as the Petitioner more than adequately covered these matters in his petition. Instead, Safari Club files this amicus brief to describe the impact that the district court's and Ninth Circuit's rulings are having and will continue to have on the hunting community.

This brief presents the view of both resident and nonresident hunters who enjoy Alaska's world-class hunting resources and opportunities and who require transportation on the waters that exist within the boundaries of Conservation System Unit ("CSU") lands administered by the National Park Service ("NPS").[2]

---

2. Conservation System Units in Alaska include "any unit in Alaska of the National Park System, National Wildlife Refuge System, National Wild and Scenic Rivers Systems, National Trails System, National Wilderness Preservation System, or a National Forest Monument including existing units, units established,

Access to hunting areas and opportunities is of primary concern to Safari Club, its members, and many other hunters throughout the United States and the world. In Alaska, hunters often face significant obstacles to access hunting areas due to limited road coverage and the isolated nature of many valued hunting locations. Access to those opportunities depends upon hunters' ability to use all means of travel on rivers and other navigable waters in CSUs in Alaska. Safari Club and its members, along with the hunting community generally, seek to protect the full range of hunting and sustainable-use conservation opportunities available in Alaska.

SUMMARY OF THE ARGUMENT

Safari Club supports the petition for a writ of certiorari filed by John Sturgeon because the outcome of this litigation affects many people who hunt in Alaska. The ability to access hunting areas is essential to the hunter. In Alaska, hunting opportunities are often found in isolated, difficult to reach places, to which there is no road access. A viable, and often the most viable, means of access is air travel by float plane. The NPS's decision, upheld by both the federal district court in Alaska and the Ninth Circuit Court of Appeals, that the NPS has the authority to regulate activity on the navigable waters that exist within CSU boundaries, poses a severe threat to all who wish to

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designated, or expanded by or under the provisions of [the Alaska National Interest Lands Conservation Act of 1980], additions to such units, and any such unit established, designated, or expanded hereafter." 16 U.S.C. § 3102(4), *see also* John Sturgeon's Petition for a Writ of Certiorari, at 7-8 n.2. For the purposes of this brief, all references to CSUs include only those CSU lands administered by the NPS.

hunt in these inaccessible locations. The extension of 36 C.F.R. § 1.2 to those waters triggered the application of 36 C.F.R. § 2.17 and its prohibition against the use of aircraft on navigable waters within CSUs. The regulatory ban against float planes landing on the majority of those waters will make it impossible for both resident and non-resident hunters and their guides to reach hunting locations within and around CSUs, including many National Preserves. Despite the fact that Congress mandated the authorization of hunting in Alaska's National Preserves, the NPS has thwarted Congress' directive by applying regulations that undermine hunters' abilities to access and use National Preserves for hunting.

ARGUMENT

Safari Club supports John Sturgeon's petition for a writ of certiorari for the reasons stated in his petition. In addition, this Court should grant certiorari because "a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court." Sup. Ct. Rule 10(c). That issue – whether 16 U.S.C. § 3103(c) precludes the NPS from regulating activities on navigable waters found within the boundaries of CSUs administered by the NPS in Alaska – has not previously been considered by this Court.

In addition, this Court should grant certiorari because the impact of the Alaska district court and Ninth Circuit Court of Appeals' decisions extends far beyond John Sturgeon's personal hovercraft use. The courts' interpretations of section 3103(c) will deprive many hunters, guides, and outfitters of access to congressionally-mandated recreational activities available within and outside the boundaries of federal lands in Alaska.

A. Respondents' Exercise of Authority Over Waters Within CSU Boundaries Deprives Hunters of Access to Hunting Opportunities

Petitioner John Sturgeon filed suit in federal district court in Alaska to challenge the exercise of authority by Respondent Sue Masica, in her official capacity as Alaska Regional Director of the National Park Service, and other Respondents, to prohibit Sturgeon from operating his hovercraft on navigable waters flowing within the boundaries of the Yukon-Charley Rivers National Preserve. Sturgeon, a hunter, used his hovercraft to travel to favored moose hunting locations in Alaska. The authority that Sturgeon brought this lawsuit to challenge, and that the district court and Ninth Circuit each upheld, impacts far more than his ability to visit a moose hunting area or even the ability of hunters generally to use hovercrafts within the boundaries of CSUs in Alaska. The authority that John Sturgeon's petition for a writ of certiorari asks this Court to review threatens the ability of hunters and guides generally throughout Alaska to access hunting opportunities located both inside and outside the boundaries of CSUs managed by the NPS. Unless this Court rejects the district court and Ninth Circuit's interpretation of Respondents' authority to regulate activity on navigable waters within CSU boundaries, hunters will be deprived of essential means of transportation to the remote hunting opportunities in and near many of the lands administered by the NPS in Alaska.

B. The District Court and Ninth Circuit Rulings Deprive Hunters of Aircraft Access to Hunting Opportunities

Float planes, because they can land on water, provide an essential means of transportation for hunters in Alaska. The use of float planes in CSUs is at risk because of the rulings in this case. The Ninth Circuit, affirming the ruling of the district court, upheld the NPS's asserted authority, to regulate activities on

> navigable waters and areas within their ordinary reach (up to the mean high water line in places subject to the ebb and flow of the tide and up to the ordinary high water mark in other places) and without regard to the ownership of submerged lands, tidelands, or lowlands

36 C.F.R. § 1.2(a)(3). Not only would that authority enable the NPS to prohibit the use of hovercrafts on such waters within the boundaries of CSUs administered by the NPS, but pursuant to 36 C.F.R. § 2.17(a), it would also result in the prohibition against the use of most types of aircraft on those waters:

> (a) The following are prohibited:
> (1) Operating or using aircraft on lands or waters other than at locations designated pursuant to special regulations.

Id. § 2.17(a).

A prohibition on aircraft use of waters within CSU boundaries has a major impact on hunter access to

hunting opportunities in Alaska. The NPS administers approximately 43,522,000 acres of CSU lands in the state. 16 U.S.C. §§ 410hh, 410hh-1. Almost half of those lands were established under the Alaska National Interest Lands Conservation Act of 1980 ("ANILCA") as National Preserves, including the Anakchak (~ 367,000 acres), Bering Land Bridge (~ 2,457,000 acres), Denali (~ 1,330,000 acres), Gates of the Arctic (~ 900,000 acres), Glacier Bay (~ 57,000 acres), Katmai (~ 308,000 acres), Lake Clark (~ 1,214,000 acres), Noatak (~ 6,460,000 acres), Wrangell-St. Elias (~ 4,117,000 acres), and Yukon-Charley Rivers National Preserves (~ 1,713,000 acres) (totaling ~ 18,923,000 acres). *Id.* National Preserves are a major component of the lands in Alaska open to hunting.

Alaska's National Preserves, like many lands in the state, are actively hunted. Congress specifically mandated that the NPS authorize hunting on National Preserves in Alaska.

> A National Preserve in Alaska shall be administered and managed as a unit of the National Park System in the same manner as a national park except as otherwise provided in this Act and except that the taking of fish and wildlife for sport purposes and subsistence uses, and trapping ***shall be allowed in a national preserve*** under applicable State and Federal law and regulation.

16 U.S.C. § 3201 (emphasis added); *see also* 36 C.F.R. § 1340(d).

Although Alaska's National Preserves are open to hunting, access to that hunting can be difficult. Few roads run through or access all areas of those Preserves. Several of the National Preserves cannot be reached by road at all. For example, boat and aircraft provide the only access to Katmai National Park and Preserve. "Hunting and trapping within Katmai National Preserve requires extensive planning. Access in most cases will involve air taxi service via float plane from King Salmon or one of the other surrounding villages." NATIONAL PARK SERVICE, KATMAI, SPORT HUNTING AND TRAPPING, http://www.nps.gov/katm/planyourvisit/hunting.htm (last visited May 1, 2015). Similarly, no roads lead into Gates of the Arctic National Park. "Most visitors access the park by air taxi, in small aircraft equipped with floats or tundra tires." NATIONAL PARK SERVICE, GATES OF THE ARCTIC, DIRECTIONS, http://www.nps.gov/gaar/planyourvisit/directions.htm (last visited May 1, 2015).

Hunters need to be able to land float planes on the waters running through National Preserves to reach the bear, moose, caribou, sheep, goat and other species that Congress directed the NPS to make available to them to hunt. The NPS's regulation, 36 C.F.R. § 2.17, if broadly extended to all navigable waters running through National Preserves by 36 C.F.R. § 1.2, could largely prohibit the use of aircraft on those waters. With diminished ability to reach those hunting opportunities by float plane, hunters will lose the access they require to participate in the National Preserve hunting that Congress mandated.

C. The Restrictions on Access to Hunting Impact Hunters from Throughout the U.S. and the World

The world-class hunting opportunities in Alaska are not only important to Alaska residents, but to the residents of all the states (and other countries). Nonresidents flock to Alaska to experience some of the best hunting in the world.[3] As the Alaska Department of Fish and Game ("Department") explains:

> Alaska's hunting reputation is justly deserved. One-fifth the size of the entire United States, Alaska offers wilderness hunting opportunities found in few other locations in the world. It is true that huge moose occur here and that vast caribou herds dominate the landscape in some areas and seasons. Numerous mountain ranges support populations of Dall sheep and mountain goats, and Sitka black-tailed deer thrive in the

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3. While *amicus curiae* Safari Club is a hunting/conservation organization, many of its members also enjoy or make their livelihoods from fishing. Like hunting, fishing is extremely popular in Alaska. The estimated number of anglers in Alaska in 2013 was 465,936 and the number of angler-days fished in Alaska in 2013 was 2,202,957. Alaska Sport Fishing Survey, Statewide, ALASKA DEPARTMENT OF FISH AND GAME, http://www.adfg.alaska.gov/sf/sportfishingsurvey/index.cfm?ADFG=region.home (use the "Get Data" button in the "Regional Effect Summary" box to access charts containing these figures) (last visited May 1, 2015). As the Department states "[g]ood sport fishing isn't hard to find in Alaska. In fact, in this land of 3,000 rivers, 3 million lakes and 6,640 miles of coastline, a sport fisher's greatest challenge can be deciding where to get started." ALASKA DEPARTMENT OF FISH AND GAME, SPORT FISHERIES, http://www.adfg.alaska.gov/index.cfm?adfg=fishingSport.main (last visited May 1, 2015).

> coastal forests. Once extirpated from the state, muskox now range over the western and arctic coastal wilderness. Large numbers of black and brown bear also exist here. And wolves, which are found across most of the state, are also abundant in some areas.

ALASKA DEPARTMENT OF FISH AND GAME, INTRODUCTION TO ALASKA BIG GAME HUNTING, http://www.adfg.alaska.gov/index.cfm?adfg=hunting.biggameintro (last visited May 1, 2015). Because of its climate and terrain, Alaska offers some of the most challenging hunting in the United States. *Id.* The Department describes some of the animals that Alaska residents and nonresidents hunt:

- "Hunting is used to manage the size of these herds, and bison hunts are among the most popular drawing hunts in Alaska." ALASKA DEPARTMENT OF FISH AND GAME, BISON HUNTING IN ALASKA, http://www.adfg.alaska.gov/ index.cfm?adfg=bisonhunting.main (last visited May 1, 2015).

- "Alaska has an estimated 30,000 brown bears statewide. In 2007, about 1,900 brown bears were harvested in Alaska. Of that figure, about 700 were taken by Alaska residents and roughly 1,200 (or 67 percent) were taken by nonresidents." ALASKA DEPARTMENT OF FISH AND GAME, BROWN/GRIZZLY BEAR HUNTING IN ALASKA, http://www.adfg.alaska.gov/index.cfm?adfg=brown bearhunting.main (last visited May 1, 2015).

- "On average, people harvest about 22,000 caribou in Alaska each year." ALASKA DEPARTMENT OF FISH AND GAME, CARIBOU HUNTING IN ALASKA, http://www.adfg.alaska.gov/index.cfm?adfg=caribouhunting.main (last visited May 1, 2015).

- "Alaska's Dall sheep are popular with nonresident hunters, and the harvest is split fairly evenly between residents and nonresidents. In 2007, for example, nonresidents took 403 sheep, while resident hunters took 513, or about 57 percent." ALASKA DEPARTMENT OF FISH AND GAME, DALL SHEEP HUNTING IN ALASKA, http://www.adfg.alaska.gov/index.cfm?adfg=sheep hunting.main (last visited May 1, 2015).

- "Between 1987 and 2007, an average annual harvest of about 12,330 deer has occurred in Alaska." ALASKA DEPARTMENT OF FISH AND GAME, SITKA BLACK-TAILED DEER HUNTING IN ALASKA, http://www.adfg.alaska.gov/index.cfm?adfg=deerhunting.main (last visited May 1, 2015).

- "Alaskans and nonresidents annually harvest 6,000 to 8,000 moose, which translates into about 3.5 million pounds of usable meat." ALASKA DEPARTMENT OF FISH AND GAME, MOOSE HUNTING IN ALASKA, http://www.adfg.alaska.gov/index.cfm?adfg=moosehunting.main (last visited May 1, 2015).

- "In 2007, 518 mountain goats were harvested in Alaska, 158 by nonresidents (about 30

percent) and 360 by resident hunters." ALASKA DEPARTMENT OF FISH AND GAME, GOAT HUNTING IN ALASKA, http://www.adfg.alaska.gov/index.cfm?adfg=goathunting.main (last visited May 1, 2015).

- "Whether decoying brant over eel grass beds at Cold Bay, jump-shooting dabblers on Minto Flats, or waiting in a pit blind for a crack at speckle bellies in Delta, the variety of bird species hunted and the diversity of hunting venues are unique to the state. ... If you are new to the state or a non-resident, you may feel that hiring a Migratory Bird Hunting Guide would be a good way to go." There are "[a]pproximately 8,800 waterfowl hunters in Alaska ...." ALASKA DEPARTMENT OF FISH AND GAME, WATERFOWL HUNTING IN ALASKA, http://www.adfg.alaska.gov/index.cfm?adfg=waterfowlhunting.main (last visited May 1, 2015).

- "Wolves may be harvested with a hunting license and/or a trapping license. Nonresident wolf tags are only $30, ..." ALASKA DEPARTMENT OF FISH AND GAME, WOLF HUNTING IN ALASKA, http://www.adfg.alaska.gov/ index.cfm?adfg=wolfhunting.opportunities (last visited May 1, 2015).

In addition to being extremely popular, hunting supports Alaska's economy and provides a living to many guides and outfitters, who mainly cater to nonresidents. Hunting also benefits others who provide services to the out-of-state visitors. As described in the report *Economic Impacts of Guided Hunting in Alaska*, prepared by the McDowell Group, Inc. for the Alaska Professional Hunters Association, (February 2014):

> In 2012, guides contracted with 3,207 hunters, 3,055 of them nonresidents. In total, hunters spent $51 million on guided hunts. Of the total, nonresident hunters spent an estimated $48 million. In addition to hunting packages, non-resident hunters and their companions spent another $3.5 million on lodging, food and beverage, clothing, souvenirs, and outdoor equipment, among other purchases while in Alaska. Dollars spent in Alaska by non-residents provides new dollars that help support the state's economy.
>
> Including $29.5 million in direct and indirect (multiplier effects) associated with this spending, guided hunting in Alaska accounted for $78 million in total economic activity in 2012. [Page 1]

The McDowell Group, *The Economic Impacts of Guided Hunting in Alaska*, (February 2014), http://alaskaprohunter.org/Economic_Impacts_of_Guided_Hunting_Final.pdf (last visited May 1, 2015). The report also noted that a significant percentage of the guided hunting occurred on federal lands, including NPS lands:

> Contracting guides reported that ... [a]lmost half of revenue was earned hunting on federal lands, including US Fish and Wildlife Service (22 percent), US Forest Service (11 percent), ***NPS (9 percent)***, and BLM (4 percent). Eight percent was derived from private land (including Alaska Native Corporation land)." [Page 9, emphasis added]

Id. (emphasis added). As examples of some of the opportunities available in NPS lands in Alaska, the following outfitters offer guided hunts for desirable big game species: Alaska Remote Guide Service (brown/black bear, moose, and dall sheep in Denali National Preserve), http://www.alaskaremote.com/denali.htm (last visited May 1, 2015); Wrangell Outfitters (moose hunts in Wrangell, St. Elias National Preserve), http://www.wrangelloutfitters.com/guided-hunts/alaska-moose-hunting/ (last visited May 1, 2015); Mountain Monarchs of Alaska (grizzly bear, moose, caribou and Dall sheep in Noatak National Preserve), http://www.mountainmonarchs.com/western-arctic-moose-grizzly-bear-caribou-guide-service.html (last visited May 1, 2015).

CONCLUSION

A vast number of Alaska hunting opportunities will become inaccessible to hunters unless this Court grants the petition for a writ of certiorari submitted by John Sturgeon and reverses the rulings of the Alaska district court and Ninth Circuit. Respondents' exercise of authority over the navigable waters that exist within CSUs such as National Preserves triggers regulatory prohibitions against the use of aircraft on these waters. Those prohibitions will make it more difficult, if not impossible, for hunters to travel to valued hunting sites and enjoy Alaska's wildlife resources. Safari Club supports John Sturgeon's petition for a writ of certiorari and asks this Court to review the rulings of the courts below that, if not reversed, will deprive residents and non-residents of Alaska hunting opportunities.

Respectfully submitted,

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May 4, 2015

No. 14-1209

In The Supreme Court of the United States

JOHN STURGEON,

Petitioner,

v.

BERT FROST, IN HIS OFFICIAL CAPACITY AS ALASKA REGIONAL DIRECTOR OF THE NATIONAL PARK SERVICE, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICUS CURIAE* SOUTHEASTERN LEGAL FOUNDATION SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether Section 103(c) of the Alaska National Interest Lands Conservation Act of 1980 prohibits the National Park Service from exercising regulatory control over State, Native Corporation, and private Alaska land physically located within the boundaries of the National Park System.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
INTEREST OF *AMICUS CURIAE*	1
SUMMARY OF ARGUMENT	2
ARGUMENT	5
I. Congress declined to grant the National Park Service authority under the Property Clause to regulate non-federal lands and waters in Alaska's national parks and preserves	5
II. Congress declined to grant the National Park Service authority under the Commerce Clause to regulate non-federal lands and waters in Alaska's national parks and preserves	9
CONCLUSION	14

TABLE OF AUTHORITIES

Page

CASES

Alaska v. Babbitt, 72 F.3d 698 (9th Cir. 1995).....10

Alden v. Maine, 527 U.S. 706 (1999).....3

City of Arlington, Tex. v. FCC, 133 S. Ct. 1863 (2013).....2, 3

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John v. United States, 720 F.3d 1214 (9th Cir. 2013).....9

Kleppe v. New Mexico, 426 U.S. 529 (1976).....5

Minnesota by Alexander v. Block, 660 F.2d 1240 (8th Cir. 1981).....8

Montana v. United States, 450 U.S. 544 (1981) 9, 10

Stewart v. United States, 639 F. Supp. 2d 1190 (D. Or. 2009).....5

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United States v. Lindsey, 595 F.2d 5 (9th Cir. 1979).....6

Utility Air Regulation Group, et al. v. EPA, 134 S. Ct. 2427 (2014).....1

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS

U.S. Const. Art. I, Sec. 8, cl. 3 ..... *passim*

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STATUTES

16 U.S.C. § 1a-2(h) 11

16 U.S.C. § 3103(c) 3, 7, 10, 11

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54 U.S.C. § 100751 11

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Sup. Ct. R. 37.6 1

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The Federalist No. 45 (James Madison) (Clinton Rossiter ed., 1961) 2

INTEREST OF *AMICUS CURIAE*[1]

Southeastern Legal Foundation (SLF), founded in 1976, is a national non-profit, public interest law firm and policy center that advocates constitutional individual liberties, limited government, and free enterprise in the courts of law and public opinion. SLF drafts legislative models, educates the public on key policy issues, and litigates regularly before the Supreme Court, including such cases as *Utility Air Regulation Group, et al. v. EPA*, 134 S. Ct. 2427 (2014).

This case is of particular interest to SLF because the National Park Service's claim of extraterritorial jurisdiction is yet another example of the Executive Branch's unconstitutional usurpation of power through creation of an expansive administrative state. Over the last decade, the administrative state has grown in two primary ways – through the launching of new agencies and through the expansion of existing agencies' jurisdiction. While both means of growth offend the founding principles of limited government and enumerated powers, the latter is of prime concern because expansion of administrative jurisdiction

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[1] All parties have consented to the filing of this brief in letters on file with the Clerk of Court, and the parties were notified of *amicus curiae's* intention to file this brief. *See* Sup. Ct. R. 37.3(a). No counsel for a party has authored this brief in whole or in part, and no person other than *amicus curiae*, their members, and their counsel has made monetary contribution to the preparation or submission of this brief. *See* Sup. Ct. R. 37.6.

raises serious constitutional concerns. *Amicus* writes separately because the National Park Service's overreach and claim to full regulatory authority over non-federal land and waters within national parks and preserves in Alaska violates the Property and Commerce Clauses of the Constitution.

SUMMARY OF ARGUMENT

"The administrative state wields vast power and touches almost every aspect of daily life." *City of Arlington, Tex. v. FCC*, 133 S. Ct. 1863, 1878 (2013) (Roberts, C.J., dissenting) (quoting *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138 (2010)). "[T]he authority administrative agencies now hold over our economic, social, and political activities" *id.*, stands in stark contrast to the government of enumerated powers the Framers envisioned. Our Founding Fathers sought to create a government structure limited in nature – as James Madison explained in an effort to ease concerns that the proposed national government would usurp the People's power to govern themselves: "The powers delegated by the proposed Constitution to the federal government are few and defined . . . [and] will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce. . . ." The Federalist No. 45 (James Madison), at 292 (Clinton Rossiter ed., 1961). Today's wide-reaching "'administrative state with its reams of regulations would leave [the Founders] rubbing their eyes.'" *City of Arlington*, 133 S. Ct.

at 1878 (quoting *Alden v. Maine*, 527 U.S. 706, 807 (1999) (Souter, J., dissenting)). "It would be a bit much to describe the result as the very definition of tyranny, but the danger posed by the growing power of the administrative state cannot be dismissed." *Id.* at 1879 (citation and quotation omitted).

This case involves a straightforward question of statutory interpretation and should be decided as such. However, *amicus* files this brief because the National Park Service's overreach raises serious constitutional concerns. The National Park Service's exercise of authority must be consistent with both the Property and Commerce Clauses of the Constitution. The Constitution vests the Legislative Branch, not the Executive Branch, with the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes[,]" U.S. Const. Art. I, Sec. 8, cl. 3, and "to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States[,]" U.S. Const. Art. IV, Sec. 3, cl. 2.

Congress has neither demanded for itself federal regulatory control over the millions of acres of Alaskan land at issue in this case, nor has it granted the National Park Service *any* authority under the Commerce Clause or the Property Clause to regulate these waters. Congress has however, spoken through Section 103(c) of the Alaska National Interest Lands Conservation Act (ANILCA), 16 U.S.C. § 3103(c), to explicitly deny jurisdiction to the National Park Service to regulate non-federally owned lands and

waters within units of the National Park System of Alaska. Ignoring the plain text of the Constitution and absence of the requisite enabling legislation, the National Park Service's claim of extraterritorial jurisdiction violates the Property and Commerce Clauses. Similarly, any attempt by the National Park Service to rely on the Commerce and Property Clauses simply because they authorize a branch of the federal, and not state, government to enact laws related to our Country's navigable waters, results in a gross misreading of the Constitution. These flawed readings disregard the Constitution's inherent separation of powers.

The National Park Service's abuse of the limited regulatory powers Congress granted it and assertion of unsupported expansive authority are prime examples of the growing tyranny the Founding Fathers fought against. Because the Ninth Circuit's decision granting the National Park Service plenary authority to impose all nationwide regulations in Alaska violates the Constitution, this Court should reverse the Ninth Circuit's decision.

ARGUMENT

I. Congress declined to grant the National Park Service authority under the Property Clause to regulate non-federal lands and waters in Alaska's national parks and preserves.

The Property Clause grants Congress the power "to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States[,]" U.S. Const. Art. IV, Sec. 3, cl. 2. "[W]hile courts must eventually pass upon them, determinations under the Property Clause are entrusted primarily to the judgment of Congress." *Kleppe v. New Mexico*, 426 U.S. 529, 536 (1976). As such, administrative agencies can only exercise jurisdiction under the Property Clause when Congress authorizes such extraterritorial jurisdiction through specific enabling legislation.

In applying these principles, the lower courts have found that a general grant of authority over federal resources does not constitute a delegation of "specific authority to regulate non-federal property." *See Stewart v. United States*, 639 F. Supp. 2d 1190, 1201 (D. Or. 2009) (finding the United States Forest Service abused its discretion in presuming the lake at issue was non-navigable and relying only on statutes that generally authorize management of federal forests to expand its regulatory jurisdiction to prohibit the use of floatplanes and internal combustion motors on the lake). Where Congress has intended for an administrative agency to exercise such jurisdiction,

it has specifically provided for it. *See, e.g., United States v. Lindsey*, 595 F.2d 5, 6 n.1 (9th Cir. 1979) (per curium) (finding the Secretary of Agriculture had the authority to protect against the destruction of national forests by fire and other degradation only because in 16 U.S.C. §§ 551 and 1271 Congress "authorize[d] promulgation of regulations applicable to activities occurring in a national forest" and to acts that affect, threaten or endanger federal property administered by the Forest Service); *see also United States v. Hells Canyon Guide Serv.*, 660 F.2d 735, 737-38 (9th Cir. 1981) (finding the Secretary of Agriculture had the authority to regulate the use and occupancy of components of privately owned property within the Hells Canyon Recreation Area because Congress specifically granted it such authority in 16 U.S.C. §§ 551, 1281(d)).

No such enabling legislation exists here. The National Park Service would have this Court read Congress's specific invocation of its Property Clause authority in Title VIII of ANILCA to be a general grant of authority to the Secretary of Interior in administering the entirety of ANILCA.[2] However,

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[2] Section 801 of ANILCA provides:

> [I]t is necessary for the Congress to invoke its constitutional authority under the property clause and the commerce clause to protect and provide the opportunity for continued subsistence uses on the public lands by Native and non-Native rural residents[.]

16 U.S.C. § 3111(4).

Congress did not write the statute that way and went to great lengths to make clear its intent to deny jurisdiction over non-federally owned lands and waters within units of the National Park System of Alaska to the National Park Service. Importantly, Title I of ANILCA, of which Section 103(c)[3] is a part, establishes the purposes and definitions applicable to the entire statute, and includes no explicit general delegation of Congress's Property Clause authority to the executive branch agencies administering the statute.

Instead, through Section 103(c), Congress expressly refused to delegate its Property Clause power over non-federal land and waters within the national parks and preserves in Alaska. 16 U.S.C. § 3103(c). In adding Section 103(c), Congress "ma[d]e clear beyond any doubt that any State, Native, or private lands, which may lie within the outer boundaries of the

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[3] Section 103(c) of ANILCA provides:

> Only those lands within the boundaries of any conservation system unit which are public lands (as such term is defined in this Act) shall be deemed to be included as a portion of such unit. No lands which, before, on, or after December 2, 1980, are conveyed to the State, to any Native Corporation, or to any private party shall be subject to the regulations applicable solely to public lands within such units. If the State, a Native Corporation, or other owner desires to convey any such lands, the Secretary may acquire such lands in accordance with applicable law (including this Act), and any such lands shall become part of the unit, and be administered accordingly.

16 U.S.C. § 3103(c).

conservation system unit are not parts of that unit and are not subject to regulations which are applied to public lands, which, in fact, are part of the unit." 125 Cong. Rec. 11,158 (1979) (statement of Rep. Seiberling). Thus preventing the National Park Service from exercising extraterritorial jurisdiction over the lands and waters at issue in this case.

Even if the mere reference to the Property Clause in Title VIII could be construed as enabling the National Park Service to unilaterally claim jurisdiction over the non-federal land and parks at issue here, the National Park Service's exercise of that power is unconstitutional because it exceeds the powers granted to Congress under the Property Clause. Justification of extraterritorial regulation based in the Property Clause requires a showing that activities on state-owned waters sufficiently impact National Park Service controlled lands or resources. *See Minnesota by Alexander v. Block*, 660 F.2d 1240, 1249 (8th Cir. 1981) (noting that under the Property Clause, Congress's power extends "to regulation of conduct on or off the public land that would threaten the designated purpose of federal lands"). This authority allows the National Park Service to enforce only specific targeted regulations on non-federal lands to protect federal lands. *See, e.g., United States v. Alford*, 274 U.S. 264, 267 (1927) (finding the purpose of the statute was to prevent forest fires which imperil adjacent federal lands). The National Park Service has not and cannot establish that hovercraft "imperil" adjacent federal lands.

Because the National Park Service's exercise of extraterritorial jurisdiction over the lands and waters at issue here violates the Property Clause of the Constitution, the Ninth Circuit's decision should be reversed.

II. Congress declined to grant the National Park Service authority under the Commerce Clause to regulate non-federal lands and waters in Alaska's national parks and preserves.

The Commerce Clause grants Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. Art. I, Sec. 8, cl. 3. Based on this power, Congress may exercise jurisdiction over "those activities intrastate which so affect interstate commerce, or the exertion of the power of Congress over it, as to make regulation of them appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce." *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 281 (1981) (internal citations omitted).

"After a State enters the Union, title to the land is governed by state law." *Montana v. United States*, 450 U.S. 544, 551 (1981). Alaska thus owns the "shores of navigable waters, and the soils under them[.]" *John v. United States*, 720 F.3d 1214, 1224 (9th Cir. 2013). "The State's power over the beds of navigable

waters remains subject to only one limitation: the paramount power of the United States to ensure that such waters remain free to interstate and foreign commerce." *Montana*, 450 U.S. at 551. Thus, through the Commerce Clause, Congress is permitted by the Constitution to regulate certain activities occurring on navigable waters. The constitutional grant of power to the Legislative Branch does not, in any way, give the Executive Branch authority to exercise extra-territorial jurisdiction over navigable waters. Authority over navigable waters can arise only out of an explicit delegation from Congress and requires a showing that the regulated activities on State-owned waters sufficiently impact lands or resources controlled by the National Park Service.

Just like it did with respect to its authority under the Property Clause, in enacting Section 103(c) of ANILCA, Congress explicitly stated its intent to not invoke its Commerce Clause authority and to not delegate its constitutional grant of authority to regulate the non-federal waters within national parks and preserves in Alaska. *See* 16 U.S.C. § 3103(c); *see also Alaska v. Babbitt*, 72 F.3d 698, 703 (9th Cir. 1995) (expressly holding that "[n]either the language nor the legislative history of ANILCA suggests that Congress intended to exercise its Commerce Clause powers over submerged lands and navigable Alaska waters"). The fact that Congress specifically invoked its Commerce Clause power in enacting Title VIII of ANILCA and failed to do so in enacting Title I indicates that Congress did not delegate its commerce

powers to the National Park Service. Any reliance by the Executive Branch on the Commerce Clause to justify its abrogation of the plain language of Section 103(c) is both misplaced and contrary to the text.

Congress similarly declined to grant the National Park Service extraterritorial jurisdiction under the Commerce Clause when it enacted the 1976 Park Service Administration and Improvement Act. To be clear, the Park Service Administration and Improvement Act does authorize the National Park Service to adopt and enforce regulations concerning boating and related activities but it explicitly limited that authority to the scope already granted to the United States Coast Guard. 16 U.S.C. § 1a-2(h).[4]

The legislative history supports a limited reading that authorizes the National Park Service to regulate only those boating and related activities already subject

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[4] The 1976 Park Service Administration and Improvement Act, grants the Secretary of Interior the authority to

> [p]romulgate and enforce regulations concerning boating and other activities on or relating to waters located within areas of the National Park System, including waters subject to the jurisdiction of the United States: Provided, That any regulations adopted pursuant to this subsection shall be complementary to, and not in derogation of, the authority of the United States Coast Guard to regulate the use of waters subject to the jurisdiction of the United States.

16 U.S.C. § 1a-2h. This code section was later repealed and recodified by the Act of Dec. 19, 2014, Pub. L. 113-287, § 7, 128 Stat. 3094, 3273 (2014). *See* 54 U.S.C. § 100751.

to United States Coast Guard regulation. Specifically, the House Report that accompanied the final bill states:

> A clarification of the ability of the Secretary to promulgate boating activities [sic] is included, thus ensuring that this expanding use within our national parks can be specifically controlled. The Committee amendment ensures that any exercise of this regulatory authority will not be in derogation of the regulatory powers of the U.S. Coast Guard.

H.R. Rep. No. 94-1569, at 6 (1976), *as reprinted* 1976 U.S.C.C.A.N. 4290, 4291-92. The section-by-section analysis explicitly states that the National Park Service's authority to regulate boating and related uses "would be accomplished as a supplement to, and not in conflict with, any Coast Guard regulations and enforcement." *Id.* at 4292.

The Department of Interior report on the bill takes this a step further, admitting that in enacting the 1976 Park Service Administration and Improvement Act Congress did not intend to delegate its Commerce Clause power to regulate all navigable waters to the National Park Service: "In effect, Congress would be clarifying its intent to invoke its powers under the Commerce Clause of the Constitution to regulate boating and other activities to assist in the administration of the Park System." *Id.* at 4298.

In enacting the 1976 Act, Congress was respectful of the traditional state authority to manage navigable waterways and mindful to fully preserve the equal footing and public trust doctrines. Four years later, in enacting ANILCA, Congress reinforced the limitations of its delegation of commerce powers to the National Park Service's over navigable waters. Both pieces of legislation support finding that in claiming jurisdiction over non-federal lands and waters in Alaska's national parks and preserves, the National Park Service violates the Commerce Clause of the Constitution. Neither statute provides the sweeping power the National Park Service has usurped as its own. Because the National Park Service's exercise of extraterritorial jurisdiction over the non-federal lands and waters at issue here violates the Commerce Clause of the Constitution, this Court should reverse the Ninth Circuit's decision.

CONCLUSION

For the foregoing reasons, and those stated by Petitioner, John Sturgeon, Southeastern Legal Foundation respectfully requests that this Court reverse the decision below.

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November 2015

No. 14-1209

IN THE

Supreme Court of the United States

JOHN STURGEON,

Petitioner,

v.

BERT FROST, IN HIS OFFICIAL CAPACITY AS ALASKA REGIONAL DIRECTOR OF THE NATIONAL PARK SERVICE, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether Section 103(c) of the Alaska National Interest Lands Conservation Act of 1980 prohibits the National Park Service from exercising regulatory control over State, Native Corporation, and private Alaska land physically located within the boundaries of the National Park System.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner in this case is John Sturgeon.

Respondents are Bert Frost, in his official capacity as Alaska Regional Director of the National Park Service; Greg Dudgeon, in his official capacity as Superintendent of the Yukon-Charley Rivers National Preserve; Andee Sears, in her official capacity as a Special Agent for the National Park Service; Sally Jewell, in her official capacity as Secretary of the Interior; Jonathan Jarvis, in his official capacity as Director of the National Park Service; the National Park Service; and the United States Department of the Interior.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT ii

TABLE OF CONTENTS iii

TABLE OF APPENDICES vi

TABLE OF CITED AUTHORITIES vii

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY AND REGULATORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 1

A. The Allocation of Lands to the State of Alaska and Alaska Natives 1

B. The Alaska National Interest Lands Conservation Act of 1980 4

C. Regulatory History 10

D. Factual Background 14

Table of Contents

Page

E. Proceedings Below 16

SUMMARY OF ARGUMENT.....17

ARGUMENT.....21

I. ANILCA Prohibits NPS from Regulating Nonfederal Lands Within Alaska CSUs as Though They Were Part of the National Park System. 21

A. Section 103(c) of ANILCA limits NPS's general regulatory control to "public lands" within Alaska CSUs.....22

B. Congress intended for Section 103(c) to prevent NPS from regulating nonpublic lands in Alaska CSUs as though they were part of the National Park System. 28

C. NPS's construction of Section 103(c) is unreasonable.....30

II. NPS's Alternative Arguments Are Beyond the Question Presented and Provide No Basis for Affirming the Judgment Below.....33

A. Submerged lands were "conveyed" to the State of Alaska. 33

Table of Contents

Page

B. State navigable waters are not "public lands." 35

1. Ownership of submerged lands includes control of the waters flowing above them. 35

2. No federal reserved water rights for subsistence justify NPS extending its jurisdiction to state submerged lands and navigable waters. 38

CONCLUSION 39

TABLE OF APPENDICES

Page

APPENDIX A — 16 U.S.C. § 3103 . . . . . 1a

APPENDIX B — 36 C.F.R. § 1.2 . . . . . 4a

APPENDIX C — 36 C.F.R. § 2.17 . . . . . 6a

TABLE OF CITED AUTHORITIES

Page

CASES

Alaska v. Ahtna,
891 F.2d 1401 (9th Cir. 1989).....34

Alaska v. Babbitt,
72 F.3d 698 (9th Cir. 1995) 38

Alaska v. Native Vill. of Venetie Tribal Gov.,
522 U.S. 520 (1998).....3

Alaska v. United States,
201 F.3d 1154 (9th Cir. 2000).....14

Amoco Prod. Co. v. Vill. of Gambell, Alaska,
480 U.S. 531 (1987).....5

BedRoc Ltd., LLC v. United States,
541 U.S. 176 (2004).....22

Bulova Watch Co. v. United States,
365 U.S. 753 (1961).....22

Cappaert v. United States,
426 U.S. 128 (1976).....38

Chevron, U.S.A., Inc. v.
Natural Resources Defense Council, Inc.,
467 U.S. 837 (1984).....21, 27, 30

Cited Authorities

Page

Circuit City Stores, Inc. v. Adams,
532 U.S. 105 (2001) 31

City of Angoon v. Marsh,
749 F.2d 1413 (9th Cir. 1984) 4

Deal v. United States,
508 U.S. 129 (1993) 26

Dep't of Natural Res. v. Alaska Riverways, Inc.,
232 P.3d 1203 (Alaska 2010) 2

Idaho v. United States,
533 U.S. 263 (2001) 34

Illinois Cent. R. Co. v. Illinois,
146 U.S. 387 (1892) 2, 36, 37

Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am., UAW v. Johnson Controls, Inc.,
499 U.S. 187 (1991) 28

James v. State,
950 P.2d 1130 (Alaska 1997) 34

Katie John v. United States,
720 F.3d 1214 (9th Cir. 2013) 38

Koniag, Inc. v. Koncor Forest Res.,
39 F.3d 991 (9th Cir. 1994) 4

Cited Authorities

Page

Nken v. Holder,
556 U.S. 418 (2009) 27

Paroline v. United States,
134 S. Ct. 1710 (2014) 32

Sturgeon v. Masica,
768 F.3d 1066 (9th Cir. 2014) 31

Totemoff v. State,
905 P.2d 954 (Alaska 1995) 36

Trustees for Alaska v. State,
736 P.2d 324 (Alaska 1987) 2

Tyonek Native Corp. v. Sec'y of the Interior,
836 F.2d 1237 (9th Cir. 1988) 34

United States v. Alaska,
521 U.S. 1 (1997) 33

United States v. Brown,
36 F.3d 1103 (9th Cir. 1994) 12

United States v. California,
436 U.S. 32 (1978) 36

United States v. Gonzales,
520 U.S. 1 (1997) 28

Page

Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ., 550 U.S. 81 (2007) 21

STATUTES AND CONSTITUTIONAL PROVISIONS

16 U.S.C. § 1a-2(h) 11, 17

16 U.S.C. § 3 11

16 U.S.C. § 410hh 5, 6

16 U.S.C. § 460mm 5

16 U.S.C. § 539 5

16 U.S.C. § 668dd 5

16 U.S.C. § 1132 5

16 U.S.C. § 1274(a) 5

16 U.S.C. § 3101(b) 5

16 U.S.C. § 3101(d) 5, 30

16 U.S.C. § 3102(4) 5

16 U.S.C. § 3103 27

16 U.S.C. § 3103(c) ..... *passim*

Cited Authorities

Page

16 U.S.C. § 3170 30

16 U.S.C. § 3207(2) 37-38

16 U.S.C. § 3209 5

16 U.S.C. § 3213(a) 5

28 U.S.C. § 1254(1) 1

43 U.S.C. § 1311(a) 2, 18, 36

43 U.S.C. § 1601(b) 3

43 U.S.C. § 1603(b) 3

43 U.S.C. § 1605 3

43 U.S.C. § 1607 3

43 U.S.C. § 1616(d)(2) 4

43 U.S.C. § 1616(d)(2)(D) 4

43 U.S.C. § 1635(o)(1)-(2) 10

43 U.S.C. § 1636(a) 25

54 U.S.C. § 100751 11

Page

54 U.S.C. § 100751(a) 22

54 U.S.C. § 100751(b) 22

Act of Dec. 19, 2014, Pub. L. 113-287, 128 Stat. 3094 (2014) 11

Alaska Admin. Code tit. 11, § 20.990(7) 14

Alaska Admin. Code tit. 11, § 20.990(18) 14

Alaska Const. art. VIII, § 3 37

Alaska National Interest Lands Conservation Act, Pub. L. 96-487, 94 Stat. 2371 (1980) .... *passim*

Alaska Native Claims Settlement Act, Pub. L. 92-903, 85 Stat. 688 (1971) ..... *passim*

Alaska Stat. § 38.05.126(a) 37

Alaska Stat. § 38.05.126(b) 37

Alaska Statehood Act, Pub. L. 85-508, 72 Stat. 339 (1958) ..... *passim*

REGULATIONS

36 C.F.R. § 1.2(a)(3) 13, 21

36 C.F.R. § 2.17(e) 12, 13, 16

Cited Authorities

Page

36 C.F.R. § 9.37 35

36 C.F.R. § 9.38 35

36 C.F.R. § 13.1406 35

36 C.F.R. § 13.25 32

36 C.F.R. § 34.4 35

Applicability of Regulations to Non-Federal Lands and Waters Under U.S. Legislative Jurisdiction, 52 Fed. Reg. 35,238 (Sept. 18, 1987) 12

General Provisions and Non-Federal Oil and Gas Rights, 80 Fed. Reg. 65,572 (Oct. 26, 2015).....31

General Regulations for Areas Administered by the National Park Service, 48 Fed. Reg. 30,252 (June 30, 1983).....11, 12

General Regulations for Areas Administered by the National Park Service and National Park System Units in Alaska, 61 Fed. Reg. 35,133 (July 5, 1996) 13, 27, 30

National Park System Units in Alaska, 46 Fed. Reg. 31,836 (June 17, 2981) 10, 11

Proclamation No. 4611, 43 Fed. Reg. 57,009 (Dec. 5, 1978) 4

Page

Public Land Order 4582,
34 Fed. Reg. 1,025 (Jan. 23, 1969) 3

Public Land Order 5653,
43 Fed. Reg. 59,756 (Dec. 21, 1978) 4

Public Land Orders 5696-5711,
45 Fed. Reg. 9,562 (Feb. 12, 1980) 4

OTHER AUTHORITIES

125 Cong. Rec. 9,905 (1979) 7, 8

125 Cong. Rec. 11,158 (1979). ..... *passim*

125 Cong. Rec. 11,458 (1979) 9, 10

126 Cong. Rec. 21,891 (1980) 9

126 Cong. Rec. 21,882 (1980) 8

126 Cong. Rec. 30,495 (1980) 9

126 Cong. Rec. 30,498 (1980) 10, 29

S. Rep. No. 96-413 (1979) 7, 28, 29

H.R. 39, 96th Cong. (1979) 9

H.R. 39, 96th Cong. (1980) 9

Cited Authorities

Page

H.R. Con. Res. 452, 96th Cong. (1980) 9

Black's Law Dictionary (10th ed 2014) 34

Richard M. Johannsen, *Public Land Withdrawal Policy and the Antiquities Act*, 56 Wash. L. Rev. 439 (1981) 4-5

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 768 F.3d 1066 and is reproduced in the Appendix to the Petition ("App.") at 3a-34a. The Ninth Circuit's order denying rehearing en banc is unreported and is reproduced at App. 1a-2a. The opinion of the United States District Court for the District of Alaska is unreported and is reproduced at App. 35a-58a.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit issued its decision on October 6, 2014. App. 3a. A timely petition for rehearing en banc was denied on December 16, 2014. App. 1a. The petition for a writ of certiorari was timely filed on March 31, 2015, and granted on October 1, 2015. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant statutory and regulatory provisions are reproduced in the appendix to this brief.

STATEMENT OF THE CASE

A. The Allocation of Lands to the State of Alaska and Alaska Natives

Upon entering the Union in 1959, Alaska received the largest land grant in the history of the United States. The Alaska Statehood Act of 1958 ("Statehood Act")

authorized Alaska to select up to 102,550,000 acres—an area the size of California—from the public lands of the United States "which [we]re vacant, unappropriated, and unreserved at the time of their selection." Pub. L. 85-508, § 6(b), 72 Stat. 339, 340 (1958). This unprecedented grant was driven by "fear that the territory was economically immature" and that its small, dispersed population "would be unable to support a state government." *Trustees for Alaska v. State*, 736 P.2d 324, 335 (Alaska 1987). The land grant would act "as an endowment which would yield the income that Alaska needed to meet the costs of statehood" and thus "ensure the economic and social well-being of the new state." *Id.* at 335-36.

The Statehood Act also made the Submerged Lands Act of 1953, which grants "title to and ownership of the lands beneath navigable waters within the boundaries of the respective States," 43 U.S.C. § 1311(a), "applicable to the State of Alaska" such that Alaska "shall have the same rights as do existing States thereunder," Pub. L. 85-508, § 6(m), 72 Stat. 343. Alaska therefore "holds title to the beds of navigable waters 'in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties.'" *Dep't of Natural Res. v. Alaska Riverways, Inc.*, 232 P.3d 1203, 1211 (Alaska 2010) (quoting *Illinois Cent. R. Co. v. Illinois*, 146 U.S. 387, 452 (1892)).

In the decade following its admission to the Union, Alaska began selecting lands from the public domain in accordance with its rights under the Statehood Act. But land disputes quickly arose when the State attempted

to select lands over which Alaska Natives had asserted aboriginal title. Because the Statehood Act had not extinguished their claims, Alaska Natives contended that the State had no legal right to their land. As a result, the Secretary of the Interior temporarily suspended transfer of unreserved public lands to Alaska. *See* Public Land Order 4582, 34 Fed. Reg. 1,025 (Jan. 23, 1969).

In 1971, Congress passed the Alaska Native Claims Settlement Act ("ANCSA") to resolve these disputes. Pub. L. 92-903, 85 Stat. 688 (1971). Congress designed ANCSA to settle Alaska Natives' claims of aboriginal title "rapidly, with certainty, in conformity with the real economic and social needs of Natives, without litigation, with maximum participation by Natives in decisions affecting their rights and property." 43 U.S.C. § 1601(b). At the same time, Congress was intent on doing so "without establishing any permanent racially defined institutions, rights, privileges, or obligations" or "creating a reservation system or lengthy wardship or trusteeship." *Id.* In short, Congress sought to "end the sort of federal supervision over Indian affairs that had previously marked federal Indian policy." *Alaska v. Native Vill. of Venetie Tribal Gov.*, 522 U.S. 520, 523-24 (1998).

To that end, Congress extinguished the aboriginal land claims of Alaska Natives, appropriated $962.5 million to fund various Native regional and village corporations, and granted these corporations the right to select approximately 40 million acres of land. *See* 43 U.S.C. §§ 1603(b), 1605, 1607, 1610-15. "Congress contemplated that land granted under ANCSA would be put primarily to three uses—village expansion, subsistence, and capital for economic development. Of these potential uses, Congress

clearly expected economic development would be the most significant." *Koniag, Inc. v. Koncor Forest Res.*, 39 F.3d 991, 996 (9th Cir. 1994) (internal citation omitted). Indeed, Congress recognized that development of the land would allow Alaska Natives to "achiev[e] financial independence and self-sufficiency." *City of Angoon v. Marsh*, 749 F.2d 1413, 1414 (9th Cir. 1984).

B. The Alaska National Interest Lands Conservation Act of 1980

In addition to resolving the land claims of Native Alaskans, ANCSA directed the Secretary of the Interior to set aside up to 80 million acres of unreserved federal land "which the Secretary deems are suitable for addition to or creation as units of the National Park System[]." 43 U.S.C. § 1616(d)(2). The Secretary's subsequent withdrawals, however, never received congressional approval. *See id.* § 1616(d)(2)(D) (providing that the withdrawals would expire unless Congress approved them within five years). The Carter Administration (claiming authority under the Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701-1784, and the Antiquities Act of 1906, 16 U.S.C. §§ 431-433) then started withdrawing land on an *ad hoc* basis. By 1980, the Carter Administration had unilaterally withdrawn over 100 million acres of federal land. *See* Proclamation No. 4611, 43 Fed. Reg. 57,009 (Dec. 5, 1978); Public Land Order 5653, 43 Fed. Reg. 59,756 (Dec. 21, 1978); Public Land Orders 5696-5711, 45 Fed. Reg. 9,562 (Feb. 12, 1980). Alaska, which was still in the process of making its land selections under the Statehood Act, was "outraged by President Carter's expansive use of the Antiquities Act," and the "public outcry against this massive land 'lock-up' was significant." Richard M.

Johannsen, *Public Land Withdrawal Policy and the Antiquities Act*, 56 Wash. L. Rev. 439, 455 (1981).

In response, Congress enacted the Alaska National Interest Lands Conservation Act ("ANILCA"), Pub. L. 96-487, 94 Stat. 2371 (1980). ANILCA rescinded the Carter Administration's land withdrawals, *see* 16 U.S.C. § 3209, and made any future federal withdrawals in Alaska of more than 5,000 acres subject to congressional approval *see id.* § 3213(a). Congress thus developed its own polici to finally "complete the allocation of federal lands in the State of Alaska." *Amoco Prod. Co. v. Vill. of Gambell, Alaska*, 480 U.S. 531, 549 (1987). In doing so, Congress sought to balance two objectives: protecting "the national interest in the scenic, natural, cultural and environmental values on the public lands in Alaska" and, as it had done with the Alaska Statehood Act and ANCSA, ensuring "the economic and social needs of the State of Alaska and its people." 16 U.S.C. § 3101(d).

ANILCA placed more than 100 million acres into conservation system units ("CSUs") in Alaska, expanding the National Park System by over 43 million acres and creating numerous new National Monuments and Wildlife Refuges. 16 U.S.C. §§ 431, 410hh, 668dd, 460mm, 539, 1274(a), 1132.[1] The Yukon-Charley Rivers National Preserve ("Yukon-Charley") is one of these CSUs.

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1. ANILCA defined a CSU as "any unit in Alaska of the National Park System, National Wildlife Refuge System, National Wild and Scenic Rivers Systems, National Trails System. National Wilderness Preservation System, or a National Forest Monument." 16 U.S.C. § 3102(4). That definition included "existing units, units established, designated, or expanded by or under the provisions of this Act, additions to such units, and any such unit established, designated, or expanded hereafter." *Id.*

Congress identified the Yukon-Charley as "containing approximately one million seven hundred and thirteen thousand acres of public lands, as generally depicted on map numbered YUCH-90,008, and dated October 1978." 16 U.S.C. § 410hh(10). ANILCA established the Yukon-Charley as a "unit[] of the National Park System ... [to] be administered by the Secretary under the laws governing the administration of such lands and under the provisions of this Act." *Id.* § 410hh.

Because Congress sought to include an entire ecosystem within a given CSU, each one encompassed a massive amount of land—not all of which belonged to the federal government. ANILCA delineated new CSU boundaries that encompassed roughly 28 percent of all land in Alaska. Native Corporations and the State owned much of the nonfederal land contained within these CSUs. As of this year, Native Corporations alone own approximately 18 million acres within CSUs, which amount to approximately 40 percent of their total ANCSA land selections. *See* Brief of Ahtna, Inc. et al. as Amici Curiae Supporting Petitioner at 5 & Ex. 1 (Apr. 29, 2015).

The disposition of these nonfederal lands within the new or expanded CSUs received significant congressional attention. There was no question as to Congress's intent: State, Native Corporation, and private lands were not "public lands," were not part of any CSU, and would not be subject to federal regulation as if they were part of a CSU. As the Senate committee charged with drafting responsibility explained, "[t]hose private lands, and those public lands owned by the State of Alaska ... are not to be construed as subject to the management regulations which may be adopted to manage and administer any

national conservation system unit which is adjacent to, or surrounds, the private or non-Federal public lands." S. Rep. No. 96-413, at 303 (1979). Rather, only "Federal laws and regulations of general applicability to both private and public lands, such as the Clean Air Act, the Water Pollution Control Act, U.S. Army Corps of Engineers wetlands regulations, and other Federal statutes and regulations of general applicability would be applicable to private or non-Federal public land inholdings within conservations system units." *Id.* These generally-applicable statutes and regulations thus were "unaffected by the passage of this bill." *Id.*

Congress was especially concerned that ANILCA not disturb the land rights granted to Alaska Natives under ANCSA. Applying federal conservation regulations to Native Corporation lands would imperil ANCSA's goal of ensuring financial independence and self-sufficiency for Alaska Natives. As Arizona Congressman Morris Udall, one of ANILCA's primary sponsors, put it: ANILCA was a "direct out-growth of [ANCSA]," and, as a consequence, it was "important to recall the relationship between the conservation system units ... and the lands which the Native peoples of Alaska have received and will receive pursuant to the [ANCSA] in return for the extinguishment of their claims based on aboriginal title." 125 Cong. Rec. 9,905 (1979) (statement of Rep. Udall).

Congressman Udall explained that ANILCA was to have no effect on these lands:

> We recognize that there are certain lands which have been selected by Native Corporations and which are within the exterior boundaries of

> some of the conservation system units .... I want to make clear that inclusion of these Native lands within the boundaries of conservation system units is not intended to affect any rights which the Corporations may have under this act, [ANCSA], or any other law, or to restrict use of such lands by the owning Corporations nor to subject the Native lands to regulations applicable to the public lands within the specific conservation system unit.

Id.; *see also* 126 Cong. Rec. 21,882 (1980) (statement of Sen. Stevens) ("The fact that Native lands lie within the boundaries of conservation system units is not intended to affect any rights which the [Native] corporations have under this act, [ANCSA], or any other law.... The Native organizations have been given repeated assurances that including their lands within conservation units will not affect the implementation of [ANCSA]."); 125 Cong. Rec. 11,158 (1979) (statement of Rep. Seiberling) (recognizing that nothing in ANILCA "alters in any way the ability of the State or Natives to do what it will with ... lands" within the boundaries of CSUs).

Congress understood, though, that it should do more than make its intent known in legislative documents and floor statements. It thus added Section 103(c), which states:

> Only those lands within the boundaries of any conservation system unit which are public lands (as such term is defined in this Act) shall be deemed to be included as a portion of such unit. No lands which, before, on, or after December 2, 1980, are conveyed to the State, to

> any Native Corporation, or to any private party shall be subject to the regulations applicable solely to public lands within such units. If the State, a Native Corporation, or other owner desires to convey any such lands, the Secretary may acquire such lands in accordance with applicable law (including this Act), and any such lands shall become part of the unit, and be administered accordingly.

16 U.S.C. § 3103(c).[2]

Congress added Section 103(c) to "make clear beyond any doubt that any State, Native, or private lands, which may lie within the outer boundaries of the conservation system unit are not parts of that unit and are not subject to regulations which are applied to public lands, which, in fact, are part of the unit." 125 Cong. Rec. 11,158 (1979) (statement of Rep. Seiberling). Only an express statutory prohibition would guarantee that some "sharp lawyer" would not use "catch words" to circumvent Congress's intention that "the fact that [land] is within the boundaries drawn on the map for that conservation unit does not in

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2. This provision was originally located in Section 810(c) of H.R. 3651, the "Udall-Anderson" bill that eventually became ANILCA. *See* H.R. 39, 96th Cong. (1979). After the House version of ANILCA passed, 125 Cong. Rec. 11,458-59 (1979), it was replaced with the Senate's version, which did not include Section 810(c), 126 Cong. Rec. 21,891 (1980); H.R. 39, 96th Cong. (1980). This provision was included in the final version of ANILCA through a concurrent resolution that reinstated the original Section 810(c) amendment language to its new location at Section 103(c). 126 Cong. Rec. 30,495-500 (1980); *see* H.R. Con. Res. 452, 96th Cong. (1980).

any way change the status of that State, native or private land or make it subject to any of the laws or regulations that pertain to U.S. public lands." *Id.* In sum, Congress added Section 103(c) to establish "that only public lands (and not State or private lands) are to be subject to the conservation unit regulations applying to public lands." 126 Cong. Rec. 30,498 (1980) (statement of Rep. Udall).

C. Regulatory History

In the wake of ANILCA's passage, NPS adopted regulations to govern "public uses of National Park System units in Alaska, including units established by [ANILCA]." National Park System Units in Alaska, 46 Fed. Reg. 31,836, 31,836 (June 17, 1981). These NPS regulations addressed, *inter alia*, public access, camping and picnicking, carrying of firearms, and preservation of natural features. *See id.* at 31,854-64 (citing 36 C.F.R. Part 13). These Alaska-specific regulations complemented NPS's nationwide regulations and, in some cases, superseded "otherwise applicable regulatory provisions of 36 CFR Parts 1-9," which NPS found "generally inappropriate in the unique Alaska setting." *Id.* at 31,836.

NPS recognized "Sections 103(c) and 906(o) of ANILCA generally restrict the applicability of [NPS] regulations to federally-owned lands within park area boundaries." *Id.* at 31,843.[3] "Consistent with the statute

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3. Section 906(o) provides, in relevant part, that "any land withdrawn pursuant to [ANCSA] and within the boundaries of any [CSU] ... shall be added to such unit and administered accordingly" unless it is conveyed to a Native Corporation or the State; and that "[u]ntil conveyed, all Federal lands within the boundaries of a [CSU] ... shall be administered in accordance with the laws applicable to such unit." 43 U.S.C. § 1635(o)(1)-(2).

and the explanatory legislative history," then, NPS "restrict[ed] the applicability of these regulations to 'federally owned' lands ... within park area boundaries." *Id.* (citing 126 Cong. Rec. 11,115 (1980) and 126 Cong. Rec. 15,130-31 (1980)). In other words, NPS made clear that "[t]hese regulations would not apply to activities occurring on State lands. Similarly, these regulations would not apply to activities occurring on Native or any other non-federally owned land interests located inside park area boundaries." *Id.*

Two years later, NPS engaged in a "comprehensive review of [its] general regulations" applicable nationwide in an effort to "simplify" them and "ease the burden of [its] regulations on the public." General Regulations for Areas Administered by the National Park Service, 48 Fed. Reg. 30,252, 30,252 (June 30, 1983). Under the National Park Service Organic Act, the Secretary of the Interior had the authority to "make and publish such rules and regulations as he may deem necessary or proper for the use and management of the parks, monuments, and reservations under the jurisdiction of the National Park Services," 16 U.S.C. § 3, and to "[p]romulgate and enforce regulations concerning boating and other activities on or relating to waters located within areas of the National Park System, including waters subject to the jurisdiction of the United States," *id.* § 1a-2(h).[4] Acting under those authorities, NPS revised many of its general regulations governing public use and recreational activities in areas it administers. 48 Fed. Reg. at 30,252. As part of this overhaul, NPS

4. 16 U.S.C. § 3 and 16 U.S.C. § 1a-2(h) were later repealed and recodified by the Act of Dec. 19, 2014, Pub. L. 113-287, § 7, 128 Stat. 3094, 3273 (2014). *See* 54 U.S.C. § 100751.

prohibited "[t]he operation or use of hovercraft" in park areas. *Id.* at 30,286 (quoting 36 C.F.R. § 2.17(e)).

At the same time, NPS sought to clarify the extent of its jurisdiction over nonfederal lands. *See id.* at 30,260-61. In an amended version of 36 C.F.R. § 1.2(b), NPS announced that "[t]he regulations contained in Parts 1 through 7 of this chapter are not applicable on privately owned lands and water (including Indian lands and waters owned individually or tribally) within the boundaries of a park area, except as may be provided by regulations relating specifically to privately owned lands and waters under the legislative jurisdiction of the United States." *Id.* at 30,275. "Legislative jurisdiction," in turn, was defined as "lands and waters under the exclusive or concurrent jurisdiction of the United States." *Id.* at 30,276 (quoting 36 C.F.R. § 1.4).

In 1988, NPS revised Section 1.2(b) to confirm that the ban on federal regulation in the absence of legislative jurisdiction extended to all "non-federally owned lands and waters" and not just "privately owned lands and water." Applicability of Regulations to Non-Federal Lands and Waters Under U.S. Legislative Jurisdiction, 52 Fed. Reg. 35,238, 35,239 (Sept. 18, 1987).

NPS abruptly reversed course in 1996. Referencing its inability to prosecute an individual who had taken a seal from Alaskan waters for a ceremonial potlatch,[5] the

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5. In that case, *United States v. Brown*, 36 F.3d 1103 (9th Cir. 1994), the United States ceased prosecution and sought dismissal because it recognized that it neither "own[ed] the submerged land" nor had "legislative jurisdiction" over such lands. *See* Brief of the United States at 5-6, *United States v. Brown*, No. 94-30019, 1994 WL 16122537 (9th Cir. May 17, 1994).

agency purported to clarify "the applicability of those NPS regulations that apply in all National Park System areas to waters subject to federal jurisdiction located within park boundaries, including navigable waters." General Regulations for Areas Administered by the National Park Service and National Park System Units in Alaska, 61 Fed. Reg. 35,133, 35,133 (July 5, 1996). Abandoning its earlier view, NPS announced "that NPS regulations otherwise applicable within the boundaries of a National Park System unit apply on and within waters subject to the jurisdiction of the United States located within that unit, including navigable waters and areas within their ordinary reach ... irrespective of ownership of submerged lands, tidelands or lowlands, and jurisdictional status." *Id.* at 35,136 (quoting 36 C.F.R. § 1.2(a)(3)).

NPS therefore claimed power to enforce both its general regulations, which included the ban on hovercraft in 36 C.F.R. § 2.17(e), and its Alaska-specific regulations in 36 C.F.R. Part 13 over all State-owned navigable waters within the boundaries of the CSUs that ANILCA created or expanded. NPS rejected comments that Section 103(c) of ANILCA "should be interpreted as superseding NPS authority to regulate [non-federal] waters within park boundaries." *Id.* at 35,135. According to NPS, Section 103(c) "was characterized by Congress as a minor technical provision" and interpreting it to allow NPS regulation of nonfederal navigable waters within CSUs would be "consistent with [ANILCA's] underlying protective purposes." *Id.*

D. Factual Background

Petitioner John Sturgeon is a lifelong Alaskan. Prior to this dispute, he had hunted moose annually since 1971 on the Yukon River downstream from Eagle, Alaska, and its tributary, the Nation River. App. 8a. In 1990, in order to access waters of the Nation River inaccessible by other watercraft, Mr. Sturgeon purchased a small personal hovercraft and registered it with the State of Alaska. App. 8a. A hovercraft is a motorized vessel that utilizes a low-pressure air cushion produced by downward-directed fans. *See* Alaska Admin. Code tit. 11, §§ 20.990(7), (18). A hovercraft can travel over water and exposed gravel bars, which are common in Alaska. Alaska law permits the use of hovercraft on State-owned lands and waters.

From 1990 through 2007, Mr. Sturgeon used his hovercraft to access moose-hunting grounds on the Nation River, including those waters of the Nation River upriver from the Yukon-Charley boundary. App. 8a. Because the Nation River is navigable, Alaska holds title to its submerged lands. *See Alaska v. United States*, 201 F.3d 1154 (9th Cir. 2000).

In September 2007, during his annual moose-hunting trip, Mr. Sturgeon entered the Nation River from the Yukon River on his hovercraft. Approximately two miles upriver, Mr. Sturgeon stopped on a gravel bar located below the river's mean high-water mark to make repairs. Shortly thereafter, three armed NPS rangers approached him. App. 8a. The NPS rangers told Mr. Sturgeon that he was committing a federal crime by operating his State-registered hovercraft within the Yukon-Charley. App. 8a. Mr. Sturgeon explained to the NPS rangers that he

was operating his hovercraft on a State-owned navigable river. App. 8a. The NPS rangers said that Mr. Sturgeon was incorrect and insisted that he remove the hovercraft from the Yukon-Charley. App. 8a.

Mr. Sturgeon later met with NPS Special Agent Sears in Anchorage, Alaska, to discuss NPS's threat of criminal citation. App. 9a. Special Agent Sears acknowledged that the State of Alaska owned the submerged lands within the banks of the Yukon and Nation Rivers, but reaffirmed NPS's position that it would be a federal crime for Mr. Sturgeon to use his hovercraft on navigable waters within CSUs. App. 9a. She warned Mr. Sturgeon that NPS would criminally charge him if he again operated his hovercraft within the Yukon-Charley. App. 9a. Because of these warnings, Mr. Sturgeon did not use his hovercraft within the Yukon-Charley in subsequent hunting seasons. He thus was unable to hunt areas of the Nation River that he had previously accessed with his hovercraft. App. 9a.

In October 2010, Mr. Sturgeon sent a letter to then-Secretary of the Interior Ken Salazar, requesting that he initiate a rulemaking to repeal or amend NPS regulations so that NPS could no longer restrict access on State navigable waters located within the boundaries of CSUs. App. 9a. He received no response. On June 26, 2011, Mr. Sturgeon wrote to the NPS Alaska District Regional Chief Ranger, copying Special Agent Sears, requesting written confirmation that he would be cited if he again operated his hovercraft within the remote regions of the Yukon-Charley. D. Ct. Doc. No. 1-2, at 1-2 (Sept. 14, 2011). He received no response.

E. Proceedings Below

On September 14, 2011, Mr. Sturgeon filed a complaint against Sue Masica—the Alaska Regional Director of NPS at the time—and additional federal defendants in the U.S. District Court for the District of Alaska under the Administrative Procedure Act. The complaint sought, among other things, a declaratory judgment that ANILCA prohibits NPS from enforcing its regulations, including its ban on hovercraft in 36 C.F.R. § 2.17(e), on nonfederal lands in Alaska. Mr. Sturgeon also sought to enjoin the defendants from interfering with the operation of his hovercraft on navigable waters within the Yukon-Charley. The State of Alaska intervened to join the challenge.[6]

The district court granted summary judgment to the defendants. App. 35a-58a. The court recognized that the State had acquired title to the bed of the Nation River under the Statehood Act and the Submerged Lands Act. App. 55a. Nevertheless, the district court held that NPS could ban hovercraft on these waters because, in its view, Section 103(c) prohibited application of only Alaska-specific regulations. App. 56a. Because NPS's nationwide regulations, including the ban on hovercraft, "were enacted by the Department of the Interior pursuant to its general authority to adopt regulations for all NPS administered lands and waters," they were not "adopted 'solely' to address entry upon or use of various equipment on public lands within ANILCA-created conservation units such as Yukon-Charley." App. 56a.

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6. On appeal, NPS claimed that the State had no standing to bring its action. The Ninth Circuit agreed and ordered the district court to dismiss the State's complaint. App. 14a-20a.

The Ninth Circuit affirmed. Like the district court, the Ninth Circuit concluded that ANILCA did not prevent NPS from imposing its generally applicable regulations on nonfederal lands within CSUs. ANILCA's limitation on NPS authority to impose "regulations applicable solely to public lands within such units" applied only to Alaska-specific regulations. App. 25a-26a. In the court's view, ANILCA did not supersede the general authority that Congress, in 1976, vested in the Secretary of the Interior to "'[p]romulgate and enforce regulations concerning boating and other activities on or relating to waters located with areas of the National Park System, including waters subject to the jurisdiction of the United States.'" App. 25a (quoting 16 U.S.C. § la-2(h)). The Ninth Circuit concluded, therefore, that because the "hovercraft ban ... applies to all federal-owned lands and waters administered by NPS nationwide"—and not only on federal lands within Alaska—it may be enforced on Alaskan land owned by the State, Native Corporations, and individuals. App. 26a.

On October 1, 2015, this Court granted Mr. Sturgeon's petition for certiorari.

SUMMARY OF ARGUMENT

This case involves a straightforward question of statutory interpretation. ANILCA mandates that any nonfederal land within its CSU boundaries is not included in the CSUs and is exempt from regulations enacted to manage the CSUs.

Specifically, in Section 103(c), Congress provided that only "public lands" within the boundaries of CSUs "shall be deemed to be included as a portion of such

unit," and that no lands owned by "the State, [a] Native Corporation, or [a] private party shall be subject to the regulations applicable solely to public lands within such units." 16 U.S.C. § 3103(c). Congress further stated that to "become part of the unit and [be] administered accordingly," nonfederal land must first be conveyed to the United States. *Id.*

ANILCA defines "public lands" to mean "land situated in Alaska which, after December 2, 1980, are Federal lands," *id.* § 3102(3), and "federal lands" to mean "lands the title to which is in the United States after December 2, 1980," *id.* § 3102(2). Lands belonging to Alaska and Native Corporations are expressly excluded from the definition of "public lands." *Id.* § 3102(3).

There is no dispute that Alaska's navigable waters are not "public lands." Through the Statehood Act, Alaska received "title to and ownership of the lands beneath navigable waters within [its] boundaries." 43 U.S.C. § 1311(a). The Submerged Lands Act establishes that this title includes control of the waters and resources above. *See infra* at 33-35. Because Alaska's navigable waters are not "public lands," NPS may not regulate them pursuant to its general authority to manage national parks. Section 103(c) of ANILCA, a specific statutory provision, is controlling. For Mr. Sturgeon, that means that NPS had no authority to threaten him with a criminal citation for using his hovercraft on the Nation River, a State-owned navigable river in Alaska.

The Ninth Circuit found otherwise by distorting the plain meaning of Section 103(c). Focusing on the word "solely," the Ninth Circuit read Section 103(c) to mean that

nonfederal land within CSUs was exempt from only "*CSU-specific regulations*." App. 24a (emphasis in original).

But nothing in ANILCA suggests a distinction between NPS regulations applicable nationwide and those applicable only in Alaska CSUs. Instead, Section 103(c) distinguishes between NPS's authority to manage "public lands within such units" and its lack of authority to manage nonpublic (*i.e.*, nonfederal) lands within such units. Had Congress intended otherwise, it would not have expressly required that these lands be conveyed to NPS before they could be administered as part of the National Park System. Congress used the word "solely" to ensure that nonfederal lands in Alaska CSUs remained subject to laws applicable to both public and private lands (such as the Clean Air Act and Clean Water Act).

ANILCA's legislative history confirms this plain reading. Congress passed ANILCA to provide for the conservation of Alaskan lands while also preserving the unique interests of the State and Native Corporations in their respective lands. In the Statehood Act, Congress provided the State of Alaska with a historic land grant to ensure the economic prosperity of its people. And in ANCSA, Congress provided significant funds and land grants to Alaska Natives so they could achieve financial independence and self-sufficiency. In light of the economic purposes of these acts, Congress wanted to ensure that ANILCA did not undermine these objectives by saddling State and Native Corporation lands with burdensome federal regulations. Congress thus passed Section 103(c) to "make clear beyond any doubt that any State, Native, or private lands, which may lie within the outer boundaries of the conservation system unit are not parts of that unit and

are not subject to regulations which are applied to public lands, which, in fact, are part of the unit." 125 Cong. Rec. 11,158 (1979) (statement of Rep. Seiberling).

Even if ANILCA were ambiguous, which it is not, NPS's construction of Section 103(c) would be unreasonable and entitled to no deference. Under NPS's interpretation, the agency could easily evade Section 103(c)'s limitation on federal control simply by promulgating a nationwide regulation applicable to nonpublic lands. Paradoxically, this interpretation would mean that should this new regulation be more restrictive than NPS's Alaska-specific rules, public lands within CSUs would continue to receive the benefit of the relaxed Alaska-specific regulations, but nonpublic lands would not. This nonsensical outcome squarely contradicts ANILCA, which repeatedly recognizes the unique nature of Alaskan lands.

Finally, NPS's alternative arguments based on navigable waters are not before the Court and cannot salvage the agency's regulations in any event. NPS may argue that submerged lands were never "conveyed" to the State of Alaska. But the transfer of title from the United States to Alaska under the Statehood and Submerged Lands Acts is a "conveyance" under any commonly understood definition of the term. Nor are Alaskan navigable waters "public lands," as NPS may argue. It is settled law that the State's ownership of submerged lands includes control of the waters flowing above them.

In short, because the State's navigable waters are not "public lands," ANILCA makes clear that NPS may not regulate them as though they were part of a CSU. NPS thus had no power to threaten Mr. Sturgeon with

a criminal citation for using his hovercraft on the Nation River. This Court should reverse the Ninth Circuit's decision.

ARGUMENT

I. ANILCA Prohibits NPS from Regulating Nonfederal Lands Within Alaska CSUs as Though They Were Part of the National Park System.

This Court reviews a federal agency's construction of a statute that it administers under the framework set forth in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). "If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." *Id.* at 843 n.9. "Only if 'Congress has not directly addressed the precise question at issue' should a court consider 'whether the agency's answer is based on a permissible construction of the statute.'" *Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ.*, 550 U.S. 81, 107 (2007) (Kennedy, J., concurring) (quoting *Chevron*, 467 U.S. at 843).

NPS's construction of Section 103(c) cannot survive *Chevron* review. First, Congress spoke directly and clearly by specifying in ANILCA that nonfederal lands within a CSU are not part of the CSU and not subject to regulation as though they were. As a consequence, NPS's enforcement of 36 C.F.R. § 1.2(a)(3) exceeded its statutory authority. Second, the legislative history confirms that Congress intended for Section 103(c) to prevent NPS from regulating nonpublic land in Alaska CSUs as though they were part of the National Park System. Third, even

if there were any ambiguity, NPS's interpretation of Section 103(c) would still be unreasonable and depend on an impermissible construction of ANILCA.

A. Section 103(c) of ANILCA limits NPS's general regulatory control to "public lands" within Alaska CSUs.

The question presented here is whether Section 103(c) of ANILCA limits NPS's general authority to regulate nonfederal lands located within Alaska CSUs.[7] As explained below, it plainly does.

The Court's "inquiry begins with the statutory text, and ends there as well if the text is unambiguous." *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004). The text of Section 103(c) is straightforward. It provides:

> Only those lands within the boundaries of any conservation system unit which are public lands (as such term is defined in this Act) shall be deemed to be included as a portion of

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7. NPS's regulatory authority derives from two statutory sources, neither of which permits application of the hovercraft regulation to nonpublic lands within Alaska CSUs. First, the Secretary of the Interior may "prescribe such regulations as the Secretary considers necessary or proper for the use and management of System units." 54 U.S.C. § 100751(a). Second, the Secretary may "prescribe regulations under subsection (a) concerning boating and other activities on or relating to water located within System units, including water subject to the jurisdiction of the United States." *Id.* § 100751(b). But it is "familiar law that a specific statute controls over a general one." *Bulova Watch Co. v. United States*, 365 U.S. 753, 758 (1961).

> such unit. No lands which, before, on, or after December 2, 1980, are conveyed to the State, to any Native Corporation, or to any private party shall be subject to the regulations applicable solely to public lands within such units. If the State, a Native Corporation, or other owner desires to convey any such lands, the Secretary may acquire such lands in accordance with applicable law (including this Act), and any such lands shall become part of the unit, and be administered accordingly.

16 U.S.C. § 3103(c).

The Court need look no further than the provision's first sentence to resolve this dispute. State, Alaska Native, and private property holdings located within CSUs are not "public lands" as ANILCA defines that term. The preceding statutory section, Section 102, defines "lands" to mean "land, waters, and interests therein." 16 U.S.C. § 3102(1). And it defines "public lands" to mean "land situated in Alaska which, after December 2, 1980, are Federal lands," excluding from its ambit lands belonging to the "State of Alaska," "a Native Corporation," or "lands referred to in Section 19(b) of [ANCSA]." *Id.* § 3102(3). Because the navigable waterway at issue is not public land as ANILCA defines that term, it is not "a portion" of the CSU within which it is located. In other words, the State-owned river upon which Mr. Sturgeon was using his hovercraft is not part of the National Park System. NPS may not manage it as though it were.

Congress wisely understood that the nonpublic status of these lands might not prevent NPS from trying to

regulate them. Section 103(c)'s second sentence therefore provides that nonpublic lands shall not be "subject to the regulations applicable solely to public lands within such units." In other words, regulations (including NPS boating regulations) that apply to the federal portions of CSUs do not, and cannot, apply to State, Native Corporation, and private lands within CSU boundaries.

Lastly, Section 103(c)'s third sentence sets forth the only way such nonpublic land may become subject to NPS management. As the statute explains, "the State, a Native Corporation, or other owner" must "convey" the land, which "the Secretary may acquire ... in accordance with applicable law." Only after the nonpublic land is conveyed to the United States "shall [it] become part of the unit, and be administered accordingly."

When read together, Sections 102 and 103(c) evince a clear intent to protect State, Native Corporation, and private land from being managed as part of the National Park System. Every statutory reference to nonfederal land is phrased in protective or exclusionary terms. Such land is excluded from the definition of "public lands" in Section 102(3); it is excluded from the CSUs in the first sentence of Section 103(c); it is fenced off from NPS regulation in the second sentence of Section 103(c); and Section 103(c)'s third sentence ensures that it may be administered by NPS only after it has been conveyed to the federal government.

Section 103(c) has a mirror image in Section 906(o), which confirms its plain meaning. Section 906(o)(1), located in ANILCA's chapter addressing ANCSA and the Statehood Act, provides that ANCSA land withdrawals

are included in a CSU "and administered accordingly" unless they were conveyed to a Native Corporation prior to ANILCA's enactment, or unless they are subsequently conveyed to the State. 43 U.S.C. § 1635(o)(1). Section 906(o)(2) then provides that "Federal lands within the boundaries of a conservation system unit ... shall be administered in accordance with the laws applicable to such unit" only "until conveyed" out of federal ownership. *Id.* § 1635(o)(2). Like Section 103(c), Section 906(o) clearly distinguishes between management of federal and nonfederal lands. Federal lands are part of the CSU "and administered accordingly," while nonfederal lands within CSU boundaries are not deemed to be included in the CSU and are not so administered.[8] Thus, ANILCA draws a sharp distinction between federal lands, which are subject to NPS management, and nonfederal lands, which are not.

Indeed, it was not until Mr. Sturgeon initiated this litigation that NPS made the argument, which the Ninth Circuit accepted, that Section 103(c) exempts "nonfederal land" within Alaska CSUs only from Alaska "*CSU-specific regulations*." App. 24a. According to the Ninth Circuit, the phrase "regulations applicable solely to public lands within such units" distinguishes between Alaska-specific NPS regulations and nationwide NPS regulations. App. 23a-24a. The Ninth Circuit thus upheld the extension of

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8. Section 907(a) likewise makes clear that nonpublic lands within CSUs are exempt from NPS regulations applying to public lands. That provision states that nonpublic land becomes subject to federal management only if the owner agrees in writing. 43 U.S.C. § 1636(a). By implication, no agreement would be necessary if these nonpublic lands were already subject to federal management regulations.

NPS's hovercraft ban to State-owned land because it is not one that "appli[es] solely to public lands within [CSUs]" in Alaska. 16 U.S.C. § 3103(c). This regulation "applies to all federal-owned lands and waters administered by NPS nationwide, as well as all navigable waters lying within national parks." App. 26a.

The Ninth Circuit's construction of Section 103(c) is untenable. The statute does not distinguish between NPS regulations applicable nationwide and those applicable in Alaska CSUs. As explained above, it distinguishes between NPS's authority to manage "public lands within such units" and its lack of authority to manage nonpublic (*i.e.*, nonfederal) lands within such units. That is the point of Section 103(c)'s first sentence: nonfederal lands are not "deemed to be included as a portion of such unit" even if they are physically located "within the boundaries of any conservation system unit." And that is plainly the context in which Section 103(c)'s second sentence uses the phrase "within such units." *See Deal v. United States*, 508 U.S. 129, 132 (1993) ("[T]he meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used.").

Nor does the word "solely" limit the application of Section 103(c). The provision does not employ "solely" to distinguish nationwide NPS regulations from Alaska CSU-specific regulations. It distinguishes federal regulations applicable to both public and private lands—such as those enforcing the Clean Air Act and Clean Water Act—from regulations "applicable solely to public lands"—such as NPS regulations restricting boating and other activities. *See infra* at 29. Put differently, "solely" emphasizes that nonfederal lands within CSU boundaries, although

physically inside CSUs, are not subject to regulations (like the hovercraft ban challenged here) that apply only to public lands. There is no textual support for the Ninth Circuit's conclusion that "solely" modifies "within such units" instead of "public lands"—the phrase immediately following it in Section 103(c).

In sum, Section 103(c) plainly expresses Congress's intent. It provides that only "public lands" are part of CSUs; that NPS may not exert regulatory control over State, Native Corporation, and private lands located within those CSUs; and that those lands may be administered as part of the National Park System only if they are later conveyed to the federal government. Because there is no other permissible interpretation, "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-43.[9]

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9. It bears noting that ANILCA's CSUs are not delineated in the statute by reference to legal descriptions. Rather, Section 103, entitled "Maps," establishes which lands are—and which lands are not—included in ANILCA's new or expanded CSUs. 16 U.S.C. § 3103. Accordingly, NPS's claim that Section 103(c) is "a minor technical provision," 61 Fed. Reg. at 35,135, and that Congress would not have "buried" a provision this important in "the 'maps' section of ANILCA," Brief in Opposition 18 (quoting App. 42a), misses the mark. Section 103(c) is in the maps section because it is part of an enactment that was redrawing maps to create millions of acres of CSUs. The maps section was the "natural place to locate" a provision setting forth the regulatory regime that would apply to the territory being allocated in those maps. *Nken v. Holder*, 556 U.S. 418, 431 (2009).

B. Congress intended for Section 103(c) to prevent NPS from regulating nonpublic lands in Alaska CSUs as though they were part of the National Park System.

"Given the straightforward statutory command" of Section 103(c), "there is no reason to resort to legislative history." *United States v. Gonzales*, 520 U.S. 1, 6 (1997). But there can be no serious dispute that the statute's "legislative history confirms what [its] language ... compels." *Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am., UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 205 (1991). Congress's objective in inserting Section 103(c) into ANILCA was to ensure that nonfederal lands newly surrounded by or adjacent to CSUs would not be subject to NPS oversight and regulation.

Section 103(c)'s House sponsor introduced it as an amendment to "make clear beyond any doubt that any State, Native, or private lands, which may lie within the outer boundaries of the conservation system unit are not parts of that unit and are not subject to regulations which are applied to public lands, which, in fact, are part of the unit." 125 Cong. Rec. 11,158 (1979) (statement of Rep. Seiberling); *see also* S. Rep. No. 96-413, at 303 (Nov. 14, 1979) ("Those private lands, and those public lands, owned by the State of Alaska ... are not to be construed as subject to the management regulations which may be adopted to manage and administer any national conservation system unit which is adjacent to, or surrounds, the private or non-Federal public lands."). The legislative record is replete with evidence confirming Section 103(c)'s specific purpose. *See supra* at 5-10. Congress passed it to make explicit "that only public lands (and not State or private lands) are

to be subject to the conservation unit regulations applying to public lands." 126 Cong. Rec. 30,498 (1980) (statement of Rep. Udall).

Accordingly, the Ninth Circuit erred in stating that "the legislative history confirms that ANILCA § 103(c) did not purport to exempt nonfederal lands within CSUs from generally applicable federal laws and regulations like the hovercraft ban." App. 28a. In fact, that is the provision's main purpose. As Section 103(c) made clear, "the fact that [land] is within the boundaries drawn on the map for that conservation unit does not in any way change the status of that State, native, or private land or make it subject to any of the laws or regulations that pertain to U.S. public lands, so that those inholdings are clearly not controlled by any of the public land laws of the United States." 125 Cong. Rec. 11,158 (1979) (statement of Rep. Seiberling).

The legislative history also undermines the Ninth Circuit's contorted interpretation of "solely." As is evident from the provision's text, the function of "solely" in Section 103(c) is to ensure that "Federal laws and regulations of general applicability to both private and public lands, such as the Clean Air Act, the Water Pollution Control Act, U.S. Army Corps of Engineers wetland regulations and other Federal statutes of general applicability [are] applicable to private or non-Federal public land in holdings within [CSUs], and to such lands adjacent to [CSUs], and thus are unaffected by the passage of the bill." S. Rep. No. 96-413, at 303 (1979). In contrast, there is no indication from ANILCA's legislative history that Congress used "solely" to signal a distinction between Alaska CSU-specific and nationwide NPS regulations.

In its rulemaking, NPS further claimed that its revised construction of Section 103(c) was "consistent with [ANILCA's] underlying protective purposes: to protect objects of ecological, cultural, geological, historical, prehistorical, and scientific interest." 61 Fed. Reg. at 35,135. To be sure, conservation of Alaska's natural resources was one of ANILCA's purposes. *See* 16 U.S.C. § 3101(b).

But that was not Congress's only purpose. ANILCA also "provides adequate opportunity for satisfaction of the economic and social needs of the State of Alaska and its people." 16 U.S.C. § 3101(d). For example, ANILCA protects mining operations, *see* 16 U.S.C. § 3170; promotes oil and gas development, *see id.* § 3142; and supports the Alaska timber industry, *see id.* § 539d. NPS ignores the "balance" the law struck. *Id.* § 3101(d). ANILCA's massive expansion of the National Park System achieved Congress's conservationist goal, and its restriction on NPS authority to regulate nonfederal lands achieved its parallel interest in safeguarding Alaska's social and economic welfare. Petitioner's construction of Section 103(c) is faithful to Congress's careful balancing of both goals. NPS's is not.

C. NPS's construction of Section 103(c) is unreasonable.

Even if Section 103(c) were ambiguous, which it is not, the hovercraft ban still would not be "based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843. NPS's construction of Section 103(c) is at odds with the provision's restrictive design. The parties may disagree over whether Section 103(c), by its terms,

restricts NPS's authority broadly or narrowly; but they agree that the point of enacting this provision was to restrict NPS authority. Yet under NPS's construction, *any* statutory limitation on its authority is easily evaded. All NPS would need to do is promulgate a new regulation making a previously Alaska-specific rule applicable to nonpublic lands nationwide and the rule would no longer be "applicable solely" to public lands. An interpretation of Section 103(c) that renders its restriction on NPS's authority "pointless" is not reasonable. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 113 (2001).

In opposing certiorari, NPS argued that this concern is purely hypothetical unless "NPS dramatically shifts its regulatory approach" and, therefore, "enforcement of NPS rules on navigable waters within park boundaries will not make NPS's rules applicable on privately held, state-held, or Native-held inholdings." Brief in Opposition 21-22. But just last month, NPS published a notice of proposed rulemaking that would eliminate an Alaska-specific exemption from certain nationwide oil and gas rules, making the rules enforceable on State, Native Corporation, and private inholdings. *See* General Provisions and Non-Federal Oil and Gas Rights, 80 Fed. Reg. 65,572, 65,573 (Oct. 26, 2015). Notably, the rulemaking explained "that because these regulations are generally applicable to NPS units nationwide and to non-federal interests in those units, they are not 'applicable solely to public lands within [units established under ANILCA],' and thus are not affected by section 103(c) of ANILCA." *Id.* (quoting *Sturgeon v. Masica*, 768 F.3d 1066, 1077-78 (9th Cir. 2014)). Accordingly, there is no need to debate whether NPS will use its newly found power to impose nationwide regulations on nonpublic land in Alaska CSUs. It has already promised to do so.

An interpretation of Section 103(c) that leads to a "nonsensical result" is likewise unreasonable. *Paroline v. United States*, 134 S. Ct. 1710, 1729 (2014). Because of the uniqueness of Alaska's wilderness, numerous Alaska-specific rules differ from the nationwide rules governing the National Park System. Alaska's national parks, for example, have special camping, hunting, fishing, trapping, commercial activity, and motorized access rules. *See* 36 C.F.R. § 13.25 (camping); *id.* § 13.30 (weapons, traps, and nets); *id.* § 13.40 (commercial fishing); *id.* § 13.176 (commercial use of cabins); *id.* § 13.182 (construction of temporary facilities); *id.* § 13.1316 (commercial passenger transport). According to NPS's interpretation of Section 103(c), however, nonpublic lands located in Alaska CSUs would never receive the benefit of these more relaxed, Alaska-specific regulations (because they can never apply to nonpublic land). Rather, these nonpublic lands would have to comply with the nationwide rules that NPS itself determined were not appropriately sensitive to Alaska's circumstances.

The text of Section 103(c) cannot require that if NPS enacted an Alaska-specific rule permitting hovercraft, then State, Alaska Native, and private lands within those parks would, paradoxically, remain subject to the more restrictive nationwide rule. That is the epitome of an unreasonable construction of a federal statute. But it would be the inevitable consequence of adopting NPS's and the Ninth Circuit's interpretation of Section 103(c).

II. NPS's Alternative Arguments Are Beyond the Question Presented and Provide No Basis for Affirming the Judgment Below.

Both the district court and the Ninth Circuit decided this case based on their reading of Section 103(c). The question presented to this Court is thus limited to that issue. At the certiorari stage, however, NPS raised alternative arguments in an effort to sustain the extension of its hovercraft ban to nonpublic lands. But there are good reasons why the lower courts bypassed these arguments in favor of an anti-textual construction of Section 103(c). As explained below, they are all untenable.

A. Submerged lands were "conveyed" to the State of Alaska.

NPS argued below that Section 103(c) does not apply to submerged lands and navigable waters because they were not "conveyed" to the State, but instead became State land by operation of law. *See* App. 55a-56a Therefore, NPS asserted, such lands and waters could be administered as part of a CSU under Section 103(c), even though they were not "public lands." *Id.* The Ninth Circuit "assum[ed] (without deciding) that the waters of and land beneath the Nation River were 'conveyed to the State' for purposes of Section 103(c)." App. 26a. This assumption was correct.

The Alaska Statehood Act expressly incorporated the Submerged Lands Act of 1953. Pub. L. 85-508, § 6(m), 72 Stat. 339, 343 (1958). "By applying the Submerged Lands Act to Alaska through the Alaska Statehood Act, Congress granted the State title to submerged lands." *United States v. Alaska*, 521 U.S. 1, 7-8 (1997). This grant

of title to submerged lands at statehood is universally described as a transfer of an interest in property from the United States to the newly sovereign state. *See Idaho v. United States*, 533 U.S. 263, 272 (2001) ("[T]he default rule is that title to land under navigable waters passes from the United States to a newly admitted state."); *Alaska v. Ahtna*, 891 F.2d 1401, 1404 (9th Cir. 1989) (considering ownership of the lower thirty miles of the Gulkana River and noting that, "[i]f navigable, title to the submerged lands passed to Alaska at statehood").

A transfer of title to submerged lands from the United States to Alaska is a "conveyance" under any commonly understood definition of the term. Black's Law Dictionary defines "conveyance" as "[t]he voluntary transfer of a right or of property," and "convey" as "[t]o transfer or deliver (something, such as a right or property) to another, esp. by deed or other writing; esp., to perform an act that is intended to create one or more property interests, regardless of whether the act is actually effective to create those interests." Black's Law Dictionary (10th ed. 2014). Neither definition excludes transfers by operation of law. *Accord Tyonek Native Corp. v. Sec'y of the Interior*, 836 F.2d 1237, 1241 n.5 (9th Cir. 1988) (referencing "lands conveyed under the Alaska Statehood Act").

Consistent with these principles, the Alaska Supreme Court has described the transfer of submerged lands to the states at statehood as a "conveyance." *James v. State*, 950 P.2d 1130, 1138 (Alaska 1997) ("We conclude that the tidelands and lands underlying the coastal waters of the Tongass were conveyed to the State of Alaska at statehood under the equal footing doctrine and the Submerged Lands Act."). Section 103(c)'s exemption for "lands ...

conveyed to the State" thus applies to submerged lands and navigable waters.

B. State navigable waters are not "public lands."

1. Ownership of submerged lands includes control of the waters flowing above them.

NPS asserted below that navigable waters could be "public lands" under ANILCA because Alaska does not "own" water, only its submerged lands. Resp. C.A. Br. 38-40. But this novel theory has no merit because the definition of "lands" in Section 102(1) of ANILCA includes "waters." 16 U.S.C. § 3102(1). Thus, under ANILCA, submerged lands include the waters above them. NPS's regulations similarly make no distinction between ownership of "submerged lands" and ownership of "waters." *See* 36 C.F.R. §§ 34.4, 9.37, & 9.38 (purporting to regulate "federally owned or controlled lands and waters"); 36 C.F.R. § 13.1406 (regulating "state-owned lands and waters").

Furthermore, there is no legal support for distinguishing between submerged lands and the waters above. The Submerged Lands Act makes clear that it inseparably grants ownership of submerged lands *and* the right to manage and regulate the resources in the waters above:

> It is determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and

> waters, and *(2) the right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law be, and they are, subject to the provisions hereof, recognized, confirmed, established and vested in and assigned to the respective States.*

43 U.S.C. § 1311(a) (emphasis added).

The Submerged Lands Act thus grants to the States "title to and ownership of [] submerged lands *and waters*," including "the right and power to manage, administer, lease, develop, and use them." *United States v. California*, 436 U.S. 32, 40 (1978) (emphasis added) (citation and quotation omitted); *see also Totemoff v. State*, 905 P.2d 954, 964 (Alaska 1995) ("The Submerged Lands Act thus gives Alaska ownership of, title to, and management power over the following: lands beneath the navigable waters of Alaska, *the navigable waters themselves*, and fish and other marine life located in Alaska's navigable waters." (emphasis added) (footnotes omitted)).

Permitting federal regulation of navigable waterways independent of state ownership of the submerged lands beneath would also subvert the public trust doctrine. As a sovereign state, Alaska holds title to lands under navigable waters in trust for the people of Alaska, so "that they may enjoy the navigation of the waters, carry commerce over them, and have the liberty of fishing therein." *Illinois Cent.*, 146 U.S. at 453.[10] Accordingly, "title to the lands

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10. Alaska's constitution and law unequivocally recognize the rights of all Alaskans to use and access water for purposes

under the navigable waters ... necessarily carries with it control over the waters above them." *Id.* at 452. NPS's assertion that waters flowing over submerged lands may constitute federal "public lands" under ANILCA cannot be reconciled with this principle. There is no authority for divorcing control of State-owned submerged lands "from the waters above them."

NPS's argument also overlooks the fact that "public lands" in ANILCA are defined not by what Alaska owns, but by what the United States owns. ANILCA provides that "public lands" are "lands the title to which is in the United States." 16 U.S.C. §§ 3102(1)-(3). NPS has at no point demonstrated or even argued that the United States holds "title" to the waters flowing over Alaska's submerged lands. For good reason: the notion of federal "title" to water is incompatible with Alaska's undisputed ownership of submerged lands and control of the waters flowing above. 43 U.S.C. § 1311(a)(1).

Finally, ANILCA itself bars NPS's efforts to usurp Alaska's traditional control over navigable waters flowing over its submerged lands. Section 1319 makes clear that ANILCA does not "expand or diminish[] Federal or State jurisdiction, responsibility, interests, or rights in water resources development or control." 16 U.S.C.

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consistent with the public trust. *See, e.g.*, Alaska Const. art. VIII, § 3 ("Whether occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use."); Alaska Stat. § 38.05.126(a) ("The people of the state have a constitutional right to free access to and use of the navigable or public water of the state."); Alaska Stat. § 38.05.126(b) ("[T]he state holds and controls all navigable or public water in trust for the use of the people of the state.").

§ 3207(2). It also provides that the statute does not affect "in any way any law governing appropriation or use of, or Federal right to, water on lands within the State of Alaska." *Id.* § 3207(1); *see also id.* § 3202. In this way, ANILCA preserves federal rights to *use* Alaskan waters while expressly refraining from attempting to alter the preexisting balance between state and federal *control* over those waters.

2. No federal reserved water rights for subsistence justify NPS extending its jurisdiction to state submerged lands and navigable waters.

Alternatively, NPS claimed below that it had the authority under the Ninth Circuit's "*Katie John*" decisions to regulate Alaskan navigable waters as "public lands" because the United States had reserved water rights in waters flowing through Alaska CSUs to further the conservation purposes behind ANILCA. Resp. C.A. Br. 12-13, 36-38; *see Alaska v. Babbitt*, 72 F.3d 698, 704 (9th Cir. 1995) ("*Katie John I*"); *Katie John v. United States*, 720 F.3d 1214, 1245 (9th Cir. 2013) ("*Katie John II*"). These decisions, however, held that waters with associated federal reserved water rights were "public lands" only for the limited purpose of giving effect to ANILCA's subsistence provisions in Title VIII. *See Katie John I*, 72 F.3d at 702 n.9; *Katie John II*, 720 F.3d at 1245. Any reserved water rights held by the government related to subsistence provide no authority for NPS, or any other agency, to regulate beyond subsistence issues. *See Cappaert v. United States*, 426 U.S. 128, 141 (1976) ("The implied-reservation-of-water-rights doctrine, however, reserves only that amount of water necessary to fulfill the purpose of the reservation, no more.").

The NPS hovercraft prohibition at issue here was adopted for reasons wholly unrelated to subsistence. It is part of NPS's regulations promulgated under its general authorities, not any category of federal subsistence regulations promulgated under Title VIII of ANILCA. And on its face, it does not purport to manage allocation of, or access to, subsistence resources.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court reverse the decision of the Ninth Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX A — 16 U.S.C. § 3103

16 U.S.C. § 3103

§ 3103. Maps

(a) Filing and availability for inspection; discrepancies; coastal areas

The boundary maps described in this Act shall be on file and available for public inspection in the office of the Secretary or the Secretary of Agriculture with regard to the National Forest System. In the event of discrepancies between the acreages specified in this Act and those depicted on such maps, the maps shall be controlling, but the boundaries of areas added to the National Park, Wildlife Refuge and National Forest Systems shall, in coastal areas not extend seaward beyond the mean high tide line to include lands owned by the State of Alaska unless the State shall have concurred in such boundary extension and such extension is accomplished under the notice and reporting requirements of this Act.

(b) Changes in land management status; publication in Federal Register; filing; clerical errors; boundary features and adjustments

As soon as practicable after December 2, 1980, a map and legal description of each change in land management status effected by this Act, including the National Wilderness Preservation System, shall be published in the Federal Register and filed with the Speaker of the House of Representatives and the President of the Senate,

and each such description shall have the same force and effect as if included in this Act: *Provided, however*, That correction of clerical and typographical errors in each such legal description and map may be made. Each such map and legal description shall be on file and available for public inspection in the office of the Secretary. Whenever possible boundaries shall follow hydrographic divides or embrace other topographic or natural features. Following reasonable notice in writing to the Congress of his intention to do so the Secretary and the Secretary of Agriculture may make minor adjustments in the boundaries of the areas added to or established by this Act as units of National Park, Wildlife Refuge, Wild and Scenic Rivers, National Wilderness Preservation, and National Forest Systems and as national conservation areas and national recreation areas. For the purposes of this subsection, a minor boundary adjustment shall not increase or decrease the amount of land within any such area by more than 23,000 acres.

(c) Lands included within unit; acquisition of land by Secretary

Only those lands within the boundaries of any conservation system unit which are public lands (as such term is defined in this Act) shall be deemed to be included as a portion of such unit. No lands which, before, on, or after December 2, 1980, are conveyed to the State, to any Native Corporation, or to any private party shall be subject to the regulations applicable solely to public lands within such units. If the State, a Native Corporation, or other owner desires to convey any such lands, the Secretary may acquire such

lands in accordance with applicable law (including this Act), and any such lands shall become part of the unit, and be administered accordingly.

APPENDIX B — 36 C.F.R. § 1.2

36 C.F.R. § 1.2

§ 1.2 Applicability and scope.

(a) The regulations contained in this chapter apply to all persons entering, using, visiting, or otherwise within:

(1) The boundaries of federally owned lands and waters administered by the National Park Service;

(2) The boundaries of lands and waters administered by the National Park Service for public-use purposes pursuant to the terms of a written instrument;

(3) Waters subject to the jurisdiction of the United States located within the boundaries of the National Park System, including navigable waters and areas within their ordinary reach (up to the mean high water line in places subject to the ebb and flow of the tide and up to the ordinary high water mark in other places) and without regard to the ownership of submerged lands, tidelands, or lowlands;

(4) Lands and waters in the environs of the District of Columbia, policed with the approval or concurrence of the head of the agency having jurisdiction or control over such reservations, pursuant to the provisions of the Act of March 17, 1948 (62 Stat. 81);

(5) Other lands and waters over which the United States holds a less-than-fee interest, to the extent

necessary to fulfill the purpose of the National Park Service administered interest and compatible with the nonfederal interest.

(b) The regulations contained in parts 1 through 5, part 7, and part 13 of this chapter do not apply on non-federally owned lands and waters or on Indian tribal trust lands located within National Park System boundaries, except as provided in paragraph (a) or in regulations specifically written to be applicable on such lands and waters.

(c) The regulations contained in part 7 and part 13 of this chapter are special regulations prescribed for specific park areas. Those regulations may amend, modify, relax or make more stringent the regulations contained in parts 1 through 5 and part 12 of this chapter.

(d) The regulations contained in parts 2 through 5, part 7, and part 13 of this section shall not be construed to prohibit administrative activities conducted by the National Park Service, or its agents, in accordance with approved general management and resource management plans, or in emergency operations involving threats to life, property, or park resources.

(e) The regulations in this chapter are intended to treat a mobility-impaired person using a manual or motorized wheelchair as a pedestrian, and are not intended to restrict the activities of such a person beyond the degree that the activities of a pedestrian are restricted by the same regulations.

APPENDIX C — 36 C.F.R. § 2.17

36 C.F.R. § 2.17

§ 2.17 Aircraft and air delivery.

(a) The following are prohibited:

(1) Operating or using aircraft on lands or waters other than at locations designated pursuant to special regulations.

(2) Where a water surface is designated pursuant to paragraph (a)(1) of this section, operating or using aircraft under power on the water within 500 feet of locations designated as swimming beaches, boat docks, piers, or ramps, except as otherwise designated.

(3) Delivering or retrieving a person or object by parachute, helicopter, or other airborne means, except in emergencies involving public safety or serious property loss, or pursuant to the terms and conditions of a permit.

(b) The provisions of this section, other than paragraph (c) of this section, shall not be applicable to official business of the Federal government, or emergency rescues in accordance with the directions of the superintendent, or to landings due to circumstances beyond the control of the operator.

(c)(1) Except as provided in paragraph (c)(3) of this section, the owners of a downed aircraft shall remove the

aircraft and all component parts thereof in accordance with procedures established by the superintendent. In establishing removal procedures, the superintendent is authorized to: (i) Establish a reasonable date by which aircraft removal operations must be complete; (ii) determine times and means of access to and from the downed aircraft; and (iii) specify the manner or method of removal.

(2) Failure to comply with procedures and conditions established under paragraph (c)(1) of this section is prohibited.

(3) The superintendent may waive the requirements of paragraph (c)(1) of this section or prohibit the removal of downed aircraft, upon a determination that: (i) The removal of downed aircraft would constitute an unacceptable risk to human life; (ii) the removal of a downed aircraft would result in extensive resource damage; or (iii) the removal of a downed aircraft is impracticable or impossible.

(d) The use of aircraft shall be in accordance with regulations of the Federal Aviation Administration. Such regulations are adopted as a part of these regulations.

(e) The operation or use of hovercraft is prohibited.

(f) Violation of the terms and conditions of a permit issued in accordance with this section is prohibited and may result in the suspension or revocation of the permit.

No. 14-1209

In the Supreme Court of the United States

JOHN STURGEON, PETITIONER

v.

BERT FROST, IN HIS OFFICIAL CAPACITY AS ALASKA REGIONAL DIRECTOR OF THE NATIONAL PARK SERVICE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS

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QUESTION PRESENTED

Whether Section 103(c) of the Alaska National Interest Lands Conservation Act, 16 U.S.C. 3103(c), withdrew the National Park Service's authority to regulate activities on navigable waters within the National Park System in Alaska.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statutory provisions and regulations involved 2
Statement 2
A. Statutory background 2
1. The National Parks 2
2. The Alaska National Interest Lands Conservation Act and its predecessors 5
a. Pre-ANILCA statutes 5
b. ANILCA 7
3. Protection of waters in Alaska following enactment of ANILCA 12
4. The current regulatory framework 16
B. The proceedings in this case 18
Summary of argument 21
Argument:
Section 103(c) of ANILCA does not strip the National Park Service of authority to enforce rules for navigable waters within the boundaries of National Parks 25
A. The navigable waters in National Parks are not covered by the limitations in Section 103(c) 26
1. The navigable waters in National Parks do not fall within the terms of Section 103(c) 26
a. Navigable waters are not lands "conveyed to the State, to any Native Corporation, or to any private party" 27
b. The United States has interests in navigable waters within National Parks in Alaska 30

Table of Contents—Continued: Page

2. Other ANILCA provisions confirm that navigable waters within National Parks may be regulated as "public lands" under ANILCA 33
3. The addition of Section 103(c) as a "correction[]" confirms that it should not be construed to rescind the Park Service's authority 41
4. The legislative history also shows that Congress did not intend Section 103(c) to effect a sweeping withdrawal of Park Service authority 43
5. The Secretary's reasonable interpretation of "public lands" is entitled to deference 44
6. Congress has ratified the Secretary's interpretation of "public lands" 46

B. The Park Service rule is not foreclosed by Section 103(c) in any event because it is not a rule "applicable solely to public lands" within conservation system units 48
1. Section 103(c) does not bar the Park Service from enforcing in Alaska the regulations that are applicable to public and non-public lands within National Park boundaries 47
2. The legislative history confirms that, at a minimum, park regulations that are applicable to both public and private lands are unaffected by Section 103(c) 52
3. The Secretary's construction of Section 103(c) as limiting only park rules "applicable solely to public lands" is entitled to deference 53

Table of Contents—Continued: Page

4. The Park Service regulation making parks rules applicable on navigable waters within the boundaries of National Parks is not barred by the limits in Section 103(c) 56

Conclusion 60

Appendix — Statutory and regulatory provisions involved 1a

TABLE OF AUTHORITIES

Cases:

Alaska v. *Babbitt*, 72 F.3d 698 (9th Cir. 1995), cert. denied, 576 U.S. 1036, and 517 U.S. 1187 (1986), adhered to *sub nom. John* v. *United States*, 247 F.3d 1032 (9th Cir. 2001) 13, 31, 32, 46

Alaska v. *Carter*, 462 F. Supp. 1155 (D. Alaska 1978) 7

Alaska v. *United States*, 545 U.S. 75 (2005) 28

Alaska Pac. Fisheries v. *United States*, 248 U.S. 78 (1918) 34

Amoco Prod. Co. v. *Village of Gambell*, 480 U.S. (1987) 29, 31, 32

Cappaert v. *United States*, 426 U.S. 128 (1976) 29

Chevron U.S.A. Inc. v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984) 19

City of Arlington, Tex. v. *Federal Commc'ns Comm'n*, 133 S. Ct. 1863 (2013) 44

Federal Power Comm'n v. *Niagara Mohawk Power* Corp., 347 U.S. 239 (1954) 27, 30

John v. *United States*, 720 F.3d 1214 (9th Cir. 2013), cert. denied, 134 S. Ct. 1759 (2014) 31

National Ass'n of Home Builders v. *Defenders of Wildlife*, 551 U.S. 644 (2007) 44

Cases—Continued: Page

PPL Mont., LLC v. *Montana*, 132 S. Ct. 1215 (2012) 5, 28
The Daniel Ball, 77 U.S. (10 Wall.) 557 (1871) 5
United States v. *Appalachian Elec. Power Co.*, 311 U.S. 377 (1940) 56
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United States v. *Rands*, 389 U.S. 121 (1967) 56
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United States v. *Wilde*, No. 10-cr-21, 2013 WL 6237704 (D. Alaska Dec. 3, 2013), aff'd, 585 Fed. Appx. 336 (9th Cir. 2014) 37
Whitman v. *American Trucking Ass'ns*, 531 U.S. 457 (2001) 41

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Act of Dec. 19, 2014, Pub. L. No. 113-287, 128 Stat. 3096 3
Act of Feb. 26, 1917, ch. 121, 39 Stat. 938 2
Act of Feb. 26, 1919, ch. 44, 40 Stat. 1175 2
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§ 1, 72 Stat. 339 7
§ 6(b), 72 Stat. 340 7
Act of Mar. 1, 1872, ch. 24, § 2, 17 Stat. 33 2
Act of Oct. 1, 1890, ch. 1263, § 1, 26 Stat. 651 2

Statutes and regulations—Continued: Page

Act of Oct. 7, 1976, Pub. L. No. 94-458, § 1, 90 Stat. 1939 4
Act of Oct. 19, 1984, Pub. L. No. 98-506, 98 Stat. 2338 55
Act of Sept. 24, 1918, 40 Stat. 1855 2
Alaska National Interest Lands Conservation Act, Pub. L. No. 96-487, 94 Stat. 2371 (16 U.S.C. 3101 *et seq.*) 2
§ 103(c), 94 Stat. 2377 ..... *passim*
§ 203, 94 Stat. 2383 9
§ 205, 94 Stat. 2384 9
§§ 301-306, 94 Stat. 2384-2396 9
§ 303(7)(D), 94 Stat. 2393 38
§ 501, 94 Stat. 2398 9
§ 505, 94 Stat. 2405 10
§§ 601-603, 94 Stat. 2413-2414 ..... 10, 36
§ 804, 94 Stat. 2423 9
§§ 901-911, 94 Stat. 2430-2447 27
§ 906, 94 Stat. 2437 27
§ 1406, 94 Stat. 2494 27
§ 1410, 94 Stat. 2496 27
§§ 1416-1431, 94 Stat. 2499-2533 1
§ 1421, 94 Stat. 2509 27
§ 1437, 94 Stat. 2546 27
16 U.S.C. 3101 ..... *passim* , 1a
16 U.S.C. 3101(a) 8, 34, 36, 1a
16 U.S.C. 3101(b) 8, 34, 36, 1a
16 U.S.C. 3101(c) 8, 11, 2a
16 U.S.C. 3101(d) 8, 2a
16 U.S.C. 3102(1) 11, 35, 3a
16 U.S.C. 3102(1)-(3) 11, 3a

Statutes and regulations—Continued: Page

16 U.S.C. 3102(3) 33, 3a
16 U.S.C. 3102(4) 7, 37
16 U.S.C. 3102(13) 32
16 U.S.C. 3102 note 14, 47
16 U.S.C. 3103 ..... 33, 4a
16 U.S.C. 3103(a) 42, 4a
16 U.S.C. 3103(b) 43, 5a
16 U.S.C. 3103(c) 43, 6a
16 U.S.C. 3113 ..... *passim*
16 U.S.C. 3114 ..... 10, 35
16 U.S.C. 3115(d) 10
16 U.S.C. 3121 37
16 U.S.C. 3170 ..... 9, 37
16 U.S.C. 3191(a) 12
16 U.S.C. 3191(b)(7) 24, 52
16 U.S.C. 3201 37
16 U.S.C. 3203(b) 37
16 U.S.C. 3204 37
16 U.S.C. 3207 40
16 U.S.C. 3207(1) 40
16 U.S.C. 3207(2) 41
16 U.S.C. 3207(3) 41
16 U.S.C. 3209 7
Alaska Native Claims Settlement Act, 43 U.S.C. 1601 *et seq.* 6
43 U.S.C. 1603(b) 6
43 U.S.C. 1605 6
43 U.S.C. 1607 6
43 U.S.C. 1610-1615 6
43 U.S.C. 1616(d)(2) 6

Statutes and regulations—Continued: Page

Antiquities Act of 1906, 16 U.S.C. 431 *et seq.* 7
Department of the Interior and Related Agencies Appropriations Act, 1996, Pub. L. No. 104-134, Tit. III, § 336, 110 Stat. 1321-210 ..... 14, 47
Department of the Interior and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-83, Tit. III, 111 Stat. 1:
§ 316(a), 111 Stat. 50 ..... 14, 47
§ 316(b), 111 Stat. 50 47
§ 316(b)(3), 111 Stat. 50 47
Department of the Interior and Related Agencies Appropriations Act, 1999, Pub. L. No. 105-277, Tit. III, 112 Stat. 2681-232:
§ 339(a)(1), 112 Stat. 2681 ..... 14, 47
§ 339(a)(1), 112 Stat. 2681-295 ..... 14, 47
§ 339(b)(1), 112 Stat. 2681-295 14
National Park Service Organic Act, 54 U.S.C. 100101 *et seq.*:
54 U.S.C. 100101(a) 3, 31, 6a
54 U.S.C. 100751(a) 3, 56, 7a
54 U.S.C. 100751(b) 58, 7a
Wild and Scenic Rivers Act, 16 U.S.C. 1271 *et seq.* 10
16 U.S.C. 1274 note 10
16 U.S.C. 1274(a) 10
16 U.S.C. 1281(a) 10, 36
16 U.S.C. 1281(c) 36
Submerged Lands Act of 1953, 43 U.S.C. 1301 *et seq.* 5
43 U.S.C. 1311(a) 5, 28, 29
43 U.S.C. 1603(b) 6
43 U.S.C. 1605 6
43 U.S.C. 1607 6

Statutes and regulations—Continued: Page

43 U.S.C. 1610-1615 6
43 U.S.C. 1616(d)(2) 6
16 U.S.C. 22 2
16 U.S.C. 392 49
16 U.S.C. 403-1 50
16 U.S.C. 403-2 50
16 U.S.C. 403k-1 50
16 U.S.C. 410hh 9, 34, 36
16 U.S.C. 410hh(1) 9, 34
16 U.S.C. 410hh(6) 9, 34
16 U.S.C. 410hh(8) 9, 34
16 U.S.C. 410hh(10) 9, 34
16 U.S.C. 410hh-1 9
16 U.S.C. 410hh-2 ..... 9, 35, 43
16 U.S.C. 410hh-4 38
16 U.S.C. 539 10
16 U.S.C. 539b 10
16 U.S.C. 688dd 9
36 C.F.R.:
Pt. 1:
Section 1.1(a) (1967) 4
Section 1.1(b) (1967) 4
Section 1.2 (1967) 50
Section 1.2 ..... 25, 28, 9a
Section 1.2(a)(1) 17, 58, 9a
Section 1.2(a)(3) 17, 18, 46, 9a
Section 1.2(a)(5) 17, 10a
Section 1.2(b) 17
Section 1.29(a)(3) 51
Section 1.3(a)(2) 15

Regulations—Continued: Page

Pt. 2:
Section 2.1 17
Section 2.2 17
Section 2.3 17
Section 2.5 17
Section 2.13 (1967) 4
Section 2.14 17
Section 2.17(e) 17, 18, 10a
Section 2.24 (1967) 4
Section 2.28 (1967) 4
Section 2.31 (1967) 4
Pt. 3:
(1967) 4
(1980):
Section 3.0 4
Section 3.11 4
Section 3.14 4
(2015):
Sections 3.1-3.19 17
Pt. 6 ..... 18, 53, 57
Section 6.2(a) 16
Pt. 7 (1980):
Section 7.3 5
Section 7.4(g)-(h) 5
Section 7.9(a) 5
Section 7.12(a) 5
Section 7.14(a) 5
Section 7.20(b) 5
Section 7.22(b) 5
Section 7.22(e) 5

Regulations—Continued: Page

Section 7.23(a)-(f) (1980) 5
Section 7.46(b) (1982) 12
Section 7.46(c) (1982) 12
Pt. 9 ..... 53, 57
Section 9.1 18
Pt. 50:
Section 100.3(b) 13, 31

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Alaska Dep't of Natural Res., Mining, Land & Water, *State Policy on Navigability*, http://dnr.alaska.gov/mlw/nav/nav_policy.htm (last visited Dec. 16, 2015) 40
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Alaska National Interest Lands Conservation Act of 1979, H.R. Rep. No. 97, 96th Cong., 1st Sess. Pt. I (1979) 44
Robert T. Anderson, *Alaska Native Rights, Statehood, and Unfinished Business*, 43 Tulsa L. Rev. 17 (2007) 6
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124 Cong. Rec. 14,673 (1978) 44
125 Cong. Rec. (1979):
p. 11,156 ..... 43, 52
p. 11,158 ..... 20, 44

Miscellaneous—Continued: Page

126. Cong. Rec. (1980):
pp. 30,495-30,500 11
p. 30,498 ..... 11, 43, 52
p. 31,108 ..... 43, 52
pp. 31,108-31,109 11
Federal "Non-Reserved" Water Rights, 6 Op. O.L.C. 328 (1982) 28
31 Fed. Reg. 16,651 (Dec. 29, 1966) 4
34 Fed. Reg. 1025 (Jan. 23, 1969) 6
48 Fed. Reg. (June 30, 1983):
p. 30,252 4
p. 30,258 17
52 Fed. Reg. 35,238 (Sept. 18, 1987) 15
55 Fed. Reg. (June 29, 1990):
p. 27,114 13
p. 27,155 13
59 Fed. Reg. (Dec. 22, 1994):
p. 65,948 ..... 16, 48, 55
p. 65,950 ..... 16, 55, 56
p. 65,957 16
61 Fed. Reg. (July 5, 1996):
p. 35,133 ..... 15, 46, 58
p. 35,134 15
p. 35,135 ..... 15, 16, 46
62 Fed. Reg. (Dec. 17, 1997):
p. 66,216 14
pp. 66,217-66,218 32
64 Fed. Reg. (Jan. 8, 1999):
p. 1276 46
p. 1279 ..... 14, 32

Miscellaneous—Continued: Page

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p. 65,572 ..... 17, 52,
p. 65,575 ..... 17, 52
H.R. Con. Res. 452, 96th Cong., 2d Sess., 94 Stat. 3688 (1980) 11, 43
Proclamation No. 4626, Yukon-Charley National Monument, 43 Fed. Reg. 57,113 (Dec. 5, 1978) 6, 7
U.S. Nat'l Park & Preserve:
Gates of the Arctic General Management Plan (1986) 12
Katmai Park General Management Plan (1986) 12

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ON WRIT OF CERTIORARI
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BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a) is reported at 768 F.3d 1066. The opinion of the district court (Pet. App. 35a-58a) is not published in the *Federal Supplement* but it is available at 2013 WL 5888230.

JURISDICTION

The judgment of the court of appeals was entered on October 6, 2014. A petition for rehearing was denied on December 16, 2014 (Pet. App. 1a-2a). On February 20, 2015, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including March 31, 2015, and the petition was filed on that date. The petition was granted on October 1, 2015. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The pertinent statutory and regulatory provisions are reproduced in an appendix to this brief, App., *infra*, 1a-10a.

STATEMENT

This case concerns whether Section 103(c) of the Alaska National Interest Lands Conservation Act (ANILCA), Pub. L. No. 96-487, 94 Stat. 2371 (16 U.S.C. 3101 *et seq.*), deprives the National Park Service (NPS or Park Service) of the ability to apply parks rules on all navigable waters that lie within the boundaries of National Parks System lands in Alaska.

A. Statutory Background

1. The National Parks

a. Congress has reserved federal lands and waters as National Parks for more than a century. Congress established Yellowstone National Park—the first National Park—in 1872, when it directed the Secretary of the Interior to preserve the Park's "natural curiosities, or wonders," by ensuring "their retention in their natural condition," and to protect "the fish and game found within said park" against "capture or destruction for the purposes of merchandise or profit." Act of Mar. 1, 1872, ch. 24, § 2, 17 Stat. 33 (16 U.S.C. 22). More parks were established in the coming decades, including Yosemite National Park in 1890, Act of Oct. 1, 1890, ch. 1263, § 1, 26 Stat. 651; Grand Canyon National Park in 1919, Act of Feb. 26, 1919, ch. 44, 40 Stat. 1175; and several parks in Alaska—among the system's largest—from 1917 to 1925, see Act of Feb. 26, 1917, ch. 121, 39 Stat. 938 (Mount McKinley National Park); Proclamation of Sept. 24,

1918, 40 Stat. 1855 (Katmai National Monument); Proclamation of Feb. 26, 1925, 43 Stat. 1988 (Glacier Bay National Monument).

b. In 1916, Congress enacted the National Park Service Organic Act (Organic Act), 54 U.S.C. 100101 *et seq.* That statute consolidated authority to regulate National Parks in the Park Service, under the Secretary of the Interior, and directed the Secretary to manage the parks for the "fundamental purpose" of "conserv[ing] the scenery, natural and historic objects, and wild life" therein in a manner that "will leave them unimpaired for the enjoyment of future generations." 54 U.S.C. 100101(a). Congress further directed the Secretary to "prescribe such regulations as the Secretary considers necessary or proper for the use and management" of the National Parks. 54 U.S.C. 100751(a).[1]

In 1976, Congress enacted an additional, express authorization for the Park Service to regulate activities on waters in the National Park System. That act provides that the Secretary has the power to "[p]romulgate and enforce regulations concerning boating and other activities on or relating to waters located within areas of the National Park System, including waters subject to the jurisdiction of the United States," so long as the Secretary's regulations are not in derogation of the authority of the Coast Guard. Act of Oct. 7, 1976 (1976 Act), Pub. L. No. 94-458, § 1, 90 Stat. 1939; see 54 U.S.C. 100751(b) (current version).

c. Exercising those authorities, the Park Service has for generations adopted and enforced rules appli-

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[1] The Act of Dec. 19, 2014, Pub. L. No. 113-287, 128 Stat. 3096, recodified in Title 54 statutory provisions relating to NPS that had previously been located in Title 16.

cable on both navigable and non-navigable waters in National Parks. Regulations adopted in 1966 and in effect at the time of ANILCA's enactment in 1980 provided that Park Service regulations applied in federally owned or controlled areas.[2] See 36 C.F.R. 1.1(a) and (b) (1967); 31 Fed. Reg. 16,651 (Dec. 29, 1966).

Since that time, the Park Service has treated park waters, including navigable waters, as subject to regulation. Park Service regulations thus set forth rules concerning boating, fishing, and water sanitation, without regard to the navigability of the waters at issue. See 36 C.F.R. 2.13 (fishing), 2.24 (sanitation), 2.28 (swimming), 2.31 (water skiing); Part 3 (boating) (1967). Other regulations expressly governed only "navigable waters," setting forth rules for vessels within the parks that are on "navigable waters of the United States." See 36 C.F.R. 3.0, 3.11, 3.14 (1980). Site-specific rules also govern fishing, boating, and similar activities on particular rivers and lakes that plainly include navigable waters.[3] See, *e.g.* 36 C.F.R.

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[2] The Park Service stated that park rules applied to persons "within the boundaries of any federally owned or controlled areas administered by the National Park Service." 36 C.F.R. 1.1(a) (1967). They also provided that park rules were not applicable "on privately owned lands (including Indian lands owned either individually or tribally) within the boundaries of any park area," unless such lands were "under the legislative jurisdiction of the United States," 36 C.F.R. 1.1(b), generally meaning that the state government had partially or entirely ceded its legislative authority over the lands to the federal government, see 48 Fed. Reg. 30,252 (June 30, 1983) (citation omitted).

[3] Waters are navigable if they are "navigable in fact," meaning that "they are used, or are susceptible of being used, * * * as highways for commerce, over which trade and travel are or may be

7.3, 7.4(g)-(h), 7.9(a), 7.12(a), 7.14(a), 7.20(b), 7.22(b) and (e), 7.23(a)-(f) (1980).

2. *The Alaska National Interest Lands Conservation Act And Its Predecessors*

ANILCA, which set aside millions of acres of land in Alaska as units of the National Park System and other conservation systems, is the third in a series of major statutes addressing the allocation of federal lands in Alaska.

a. Pre-ANILCA statutes

The first modern statute to address allocation of lands in Alaska was the Alaska Statehood Act, which authorized admission of Alaska into the Union. Act of July 7, 1958 (Statehood Act), Pub. L. No. 85-508, § 1, 72 Stat. 339. That law authorized Alaska to select for conveyance to the State over 100 million acres of federal lands that were "vacant, unappropriated, and unreserved." § 6(b), 72 Stat. 340. The Statehood Act also made Alaska, like other States, subject to the Submerged Lands Act of 1953, 43 U.S.C. 1301 *et seq.*, which generally grants States "title to and ownership of the lands beneath navigable waters within the boundaries of the respective States." 43 U.S.C. 1311(a).

Following enactment of the Statehood Act, the State's attempts to select lands led to conflicts with Native groups. The Statehood Act had not extinguished claims of aboriginal title, and some Alaska Native villages protested that lands selected by the State were consequently not "vacant, unappropriated,

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conducted in the customary modes of trade and travel on water." *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1871); see *PPL Mont., LLC* v. *Montana*, 132 S. Ct. 1215 (2012).

and unreserved" for the purpose of Section 6(b) of the Statehood Act. See Robert T. Anderson, *Alaska Native Rights, Statehood, and Unfinished Business*, 43 Tulsa L. Rev. 17, 29 (2007). The Secretary of the Interior responded by temporarily suspending transfers of selected lands. 34 Fed. Reg. 1025 (Jan. 23, 1969).

The Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. 1601 *et seq.*, sought to resolve those conflicting claims. ANCSA specified that "[a]ll aboriginal titles" and "claims of aboriginal title" in Alaska were "extinguished," 43 U.S.C. 1603(b), but also directed that certain lands be withheld from state selection and instead be available for Native groups and for parks. The Native lands were to be selected by Alaskan Native Corporations, 43 U.S.C. 1603(b), 1605, 1607, 1610-1615, and the park lands were to be withdrawn by the Secretary of the Interior, see 43 U.S.C. 1616(d)(2). ANCSA contemplated that the Secretary's withdrawals would later be approved by Congress, and specified that any withdrawals not approved within five years would be returned to the pool of lands available for State and Native selection. *Ibid.* In accordance with ANCSA, the Secretary designated particular lands within Alaska for federal preserves. Congress, however, failed to approve the withdrawals within the statutory five-year period. Rather than allowing the Secretary's designations to expire, President Carter then invoked his authority under the Antiquities Act of 1906, 16 U.S.C. 431 *et seq.*, to designate the Secretary's park selections as National Monuments. See, *e.g.*, Proclamation No. 4626, Yukon-Charley National Monument, 43 Fed. Reg. 57,113 (Dec. 5, 1978). The decision to do so trig-

gered a legal challenge by the State. See *Alaska* v. *Carter*, 462 F. Supp. 1155 (D. Alaska 1978).

b. ANILCA

ANILCA sought to put an end to these lands controversies. It took steps to effectuate the conveyance of Statehood Act land selections to the State and of ANCSA land selections to Native Corporations. See ANILCA §§ 1416-1431, 94 Stat. 2499-2533. And it fulfilled ANCSA's promise of reserving additional lands as congressionally approved park units in Alaska by "set[ting] aside approximately 105 million acres of federal land in Alaska for protection of natural resource values by permanent federal ownership and management." Pet. App. 21a-22a (citation omitted).[4] These federal lands were to be set aside in "conservation system units" (CSUs)—a term of art referring to "any unit in Alaska of the National Park System, National Wildlife Refuge System, National Wild and Scenic Rivers Systems, National Trails System, National Wilderness Preservation System, or a National Forest Monument." 16 U.S.C. 3102(4).

ANILCA's Purposes. Congress set forth ANILCA's objectives expressly, in a statement that made clear that the statute was designed to ensure the conservation of the areas it set aside—including, specifically, their "waters," "freeflowing rivers," and "fish." 16 U.S.C. 3101. The statutory statement of purposes identified four objectives:

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[4] In enacting ANILCA, Congress rescinded President Carter's designations of National Monuments under the Antiquities Act, though many of the lands at issue were then placed within the conservation system units created or expanded by ANILCA itself. See 16 U.S.C. 3209.

- To preserve the "lands and waters" protected by the Act for "the benefit, use, education, and inspiration of present and future generations," based on their scenic, geological, wildlife, and other values, 16 U.S.C. 3101(a);
- To protect the areas' "natural landscapes," wildlife, "resources related to subsistence needs," historical locations, "rivers, and lands," and "wilderness resource values and related recreational opportunities," including opportunities for canoeing, fishing, and hiking "on wildlands and on freeflowing rivers," and to "maintain opportunities for scientific research and undisturbed ecosystems," 16 U.S.C. 3101(b);
- To "provide the opportunity for rural residents engaged in a subsistence way of life to continue to do so," where "consistent with management of fish and wildlife" and other principles, 16 U.S.C. 3101(c); and
- To "obviate[] * * * the need for future legislation designating" new parks in Alaska, 16 U.S.C. 3101(d).

In addition, in each of the 13 provisions of ANILCA that either created or expanded a unit of the National Park System, Congress enacted an additional statement of purpose describing natural features of the National Park at issue that Congress intended to protect. In each case, Congress's purposes included protection of bodies of water such as rivers and lakes, protection of fish or marine mammal populations, or a combination thereof. See 16 U.S.C. 410hh, 410hh-1. For some National Parks, Congress's declared purposes included ensuring protection of particular iden-

tified waters. See 16 U.S.C. 410hh(1) (Aniakchak River); 16 U.S.C. 410hh(6) ("the Kobuk River Valley, including the Kobuk, Salmon, and other rivers"); 16 U.S.C. 410hh(8) (Noatak River); 16 U.S.C. 410hh(10) ("the entire Charley River basin").

ANILCA's Parks and Their Waters. To achieve its statutory aims, Congress directed that the Secretary "shall administer the lands, waters, and interests therein" within new and expanded National Parks "as new areas of the National Park System," under the provisions of the Organic Act, the statute under which the Park Service had long regulated waters without regard to navigability. 16 U.S.C. 410hh-2. Congress also set out specific directives with which the Park Service was required to comply when regulating fishing and boating in these new and expanded parks. See ANILCA § 203, 16 U.S.C. 410hh-2; § 811, 16 U.S.C. 3121.

ANILCA placed other lands in Alaska within other types of federal preserves. Some lands were placed in wildlife refuges and national forests—with Congress again routinely specifying that the purpose of the designations included conservation of fish or waters, and again routinely setting standards anticipating federal regulation of fishing in the designated areas. See ANILCA §§ 301-306, 94 Stat. 2384-2396 (16 U.S.C. 668dd note) (wildlife refuges); § 501, 94 Stat. 2398 (16 U.S.C. 539) (forest areas); § 505, 94 Stat. 2405 (16 U.S.C. 539b) (fisheries).

In addition, 26 rivers were designated to be "Wild and Scenic Rivers" under the Wild and Scenic Rivers Act (WSRA), 16 U.S.C. 1271 *et seq.* That statute requires that "[e]ach component of the national wild and scenic rivers system shall be administered in such

manner as to protect and enhance the values which caused it to be included in said system," with "primary emphasis" on "protecting its esthetic, scenic, historic, archeological, and scientific features." 16 U.S.C. 1281(a). For each of the rivers designated as "wild and scenic" in ANILCA, Congress expressly specified that the river was "to be administered by the Secretary of the Interior" pursuant to the WSRA. §§ 601-603, 94 Stat. 2413-2414; 16 U.S.C. 1274(a) and 1274 note.

ANILCA's Subsistence-Use Priority. To achieve ANILCA's objective of preserving subsistence use, Congress provided that on all "public lands" in Alaska, the taking of fish and wildlife for nonwasteful subsistence uses "shall be accorded priority over the taking on such lands of fish and wildlife for other purposes." 16 U.S.C. 3114. ANILCA gave the State the option of assuming control of the implementation of that priority, by specifying that if the State "enact[ed] and implement[ed] laws of general applicability" that assured a priority consistent with ANILCA, the federal government would not implement its own rules for subsistence-use priority on public lands in Alaska. 16 U.S.C. 3115(d).

Section 103(c) of ANILCA. Section 103(c), which provides the basis for petitioner's claim in this case, was added to ANILCA's provision on "Maps" after ANILCA was passed by both the Senate and House of Representatives. § 103(c), 94 Stat. 2377; 16 U.S.C. 3103(c). Before the bill was enrolled and sent to the President, Congress passed a concurrent resolution to make certain technical "corrections." H.R. Con. Res. 452, 96th Cong., 2d Sess., 94 Stat. 3688 (1980) (House Resolution). The resolution's House sponsor ex-

plained that its provisions would not "change any of the major features of the Alaska National Interest Lands Conservation Act nor would they have the effect of altering provisions related to conservation areas" in Alaska. 126 Cong. Rec. 30,498 (1980) (statement of Rep. Udall). The resolution was passed with unanimous consent in both the Senate and House of Representatives. *Id.* at 31,108-31,109; see *id.* at 30,495-30,500.

Section 103(c) addresses the status of "lands"—defined as "lands, waters, and interests therein," 16 U.S.C. 3102(1)—that have been or would be "conveyed to the State, to any Native Corporation, or to any private party." 16 U.S.C. 3102(1), 3103(c). Because Congress sought to "include whole ecosystems and to follow natural features" in drawing the boundaries around conservation system units under ANILCA, substantial quantities of land that had been conveyed to the State and Native Corporations fell within the boundaries of such units. Pet. App. 22a (citation omitted). ANILCA distinguishes those lands from "public lands," which are defined as "lands, waters, and interests therein," the title to which is held by the federal government, except for land selected by the State or Native Corporations, 16 U.S.C. 3102(1)-(3); see 16 U.S.C. 3103(c).

Section 103(c) sets forth two rules relevant to private, State, and Native lands. First, it specifies that "[o]nly those lands within the boundaries of any conservation system unit which are public lands (as such term is defined in this Act) shall be deemed to be included as a portion of such unit." 16 U.S.C. 3103(c). Second, it specifies that those lands which have been "conveyed to the State, to any Native Corporation, or

to any private party" are not to be subject to a particular category of regulations—"regulations applicable solely to public lands within such units" (*i.e.*, conservation systems units). *Ibid.*

3. Protection Of Waters In Alaska Following Enactment Of ANILCA

In the period following ANILCA's enactment, the Park Service continued to regulate navigable waters in National Parks within Alaska—without treating such regulations as foreclosed by the new statute. For instance, the Park Service set forth park-specific rules that covered particular navigable waters. See, *e.g.*, 36 C.F.R. 7.46(b) and (c) (1982) (rules for Naknek Lake and Naknek River in Katmai National Monument); U.S. Nat'l Park & Preserve, *Katmai Park General Management Plan* (1986) (describing Nanek Lake and Nanek River as navigable). In addition, Park Management Plans called for under ANILCA, see 16 U.S.C. 3191(a), also expressly stated that the Park Service understood that it was responsible for "manag[ing] all waters within the boundaries" of the National Parks in Alaska to protect fish, wildlife, and their habitats, in cooperation with the State—notwithstanding state ownership of the submerged lands beneath navigable waters. See, *e.g.*, *Gates of the Arctic General Management Plan* 98, 106 (1986); *Katmai General Management Plan* 54.

More recently, the Secretary has adopted regulations expressly premised on the conclusion that "public lands," for purposes of ANILCA, include navigable waters within National Parks. The Secretary first addressed that subject in regulations issued in connection with ANILCA's subsistence-use priority. In the decade following ANILCA's enactment, Alaska

had implemented its own subsistence-use priority for hunting and fishing, in accordance with the ANILCA provision authorizing state administration of the statute's subsistence-use priority. After Alaska's subsistence-use priority was invalidated by Alaska courts, however, the Departments of the Interior and Agriculture promulgated temporary regulations to implement ANILCA's subsistence-use priority on "public lands." Those regulations were issued following an abbreviated period for comment due to the "short time available" to replace the State's invalidated regime. 55 Fed. Reg. 27,114 (June 29, 1990). The temporary regulations initially construed "public lands" narrowly, as excluding navigable waters. *Id.* at 27,115.

After Native groups brought a legal challenge, however, the Secretary concluded that the definition of "public lands" under ANILCA includes navigable waters in which the United States has reserved water rights. See U.S. Br., *John* v. *United States*, No. 94-35481, 1994 WL 16058810, at *3-*4 (9th Cir. Sept. 19, 1994). The Ninth Circuit agreed that "public lands" include "those navigable waters in which the United States has an interest by virtue of the reserved water rights doctrine." *Alaska* v. *Babbitt*, 72 F.3d 698, 703-704 (9th Cir. 1995) (*Katie John I*), cert. denied, 576 U.S. 1036, and 517 U.S. 1187 (1986), adhered to *sub nom. John* v. *United States*, 247 F.3d 1032 (9th Cir. 2001) (per curiam). Thereafter, the Secretary promulgated regulations through notice-and-comment procedures concluding that the United States has reserved water rights in the navigable waters that lie within National Parks in Alaska, which made those waters "public lands" within the meaning of ANILCA.

50 C.F.R. 100.3(b); see 64 Fed. Reg. 1279 (Jan. 8, 1999); see also 62 Fed. Reg. 66,216, 66,217-66,218 (Dec. 17, 1997) (proposed rule).

Congress delayed for several years the implementation of the regulations that identified "public lands" in this manner, but then cleared the way for them to take effect. Temporary moratoria enacted in 1996 and 1998 gave the State an interval to amend its laws to enact a subsistence-use priority for public lands that would obviate the need for the federal regulations implementing the subsistence-use priority on the navigable waters that the Secretary determined to be "public lands" based on reserved water rights. See Department of the Interior and Related Agencies Appropriations Act, 1996 (1996 Appropriations Act), Pub. L. No. 104-134, Tit. III, § 336, 110 Stat. 1321-210; Department of the Interior and Related Agencies Appropriations Act, 1998 (1998 Appropriations Act), Pub. L. No. 105-83, Tit. III, § 316(a), 111 Stat. 50; Department of the Interior and Related Agencies Appropriations Act, 1999 (1999 Appropriations Act), Pub. L. No. 105-277, Tit. III, § 339(a)(1), 112 Stat. 2681-295. Ultimately, however, Congress provided that the Secretary's regulations would take effect unless Alaska enacted a subsistence-use priority before October 1, 1999. See 1999 Appropriations Act § 339(b)(1), 112 Stat. 2681-295. When Alaska did not do so, the federal regulations took effect. See 16 U.S.C. 3102 note.

In addition, in nationwide regulations issued in 1996, the Park Service made clear that park rules apply on all "[w]aters subject to the jurisdiction of the United States, including navigable waters," within "[t]he boundaries of the National Park System." See

61 Fed. Reg. 35,133 (July 5, 1996) (36 C.F.R. 1.3(a)(2)). The Park Service explained that the rulemaking "clarifies and interprets existing NPS regulatory intent, practices and policies." *Ibid.*[5]

In promulgating that regulation, the Secretary considered and rejected Alaska's submission that "ANILCA § 103(c) preempts NPS's well-established authority on navigable waters," and that it was therefore improper for the Secretary to regulate navigable waters in National Parks in Alaska. 61 Fed. Reg. at 35,135. The Secretary emphasized that Section 103(c), which had been "characterized by Congress as a minor technical provision," should not "be read in isolation from the context of the whole act." *Ibid.* Interpreting ANILCA in a manner "consistent with its underlying protective purposes," including "to protect objects of ecological * * * interest," the Secretary rejected Alaska's argument that Section 103(c) bars

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[5] The Secretary explained that NPS had long treated its regulations as applicable on navigable waters within National Parks, and had issued regulations that depended on that premise. See 61 Fed. Reg. at 35,133 (citing examples). In 1987, however, a "non-substantive" amendment providing that NPS rules were generally not applicable on state lands led to a dispute concerning NPS's authority over navigable waters. *Id.* at 35,134 (citing 52 Fed. Reg. 35,238 (Sept. 18, 1987)). A person who had been issued a citation for shooting a seal in navigable waters of a National Park challenged his citation on the theory that the 1987 amendment had deprived NPS of authority on the waters in question, because States own the submerged lands beneath navigable waters in many National Parks. *Ibid.* The Secretary explained that the 1987 amendment had not been intended to alter NPS's practice of regulating use of navigable waters within parks. *Ibid.* The revised rule clarified that the prior practice remained valid, by making park rules applicable on all navigable waters, irrespective of "ownership of submerged lands." *Ibid.*

enforcement of Park Service rules on navigable waters in National Parks in Alaska. *Ibid.*

The Secretary has separately construed Section 103(c) as being inapplicable in the rare cases in which Park Service rules are expressly written to apply to inholdings within parks, rather than to apply only to public lands within parks. See 59 Fed. Reg. 65,948, 65,950 (Dec. 22, 1994). The issue arose when the Secretary had issued a regulation, pursuant to statutory authorization, that barred the operation of new solid-waste disposal sites "within the boundaries of all units of the National Park System." *Id.* at 65,957 (36 C.F.R. 6.2(a)). That regulation is written to apply on all lands, "whether federally or nonfederally owned." *Ibid.* The Secretary declined to create an exception for private inholdings in Alaska based on Section 103(c). The Secretary explained that Section 103(c) bars application on inholdings only of "regulations applicable *solely* to public lands within" conservation system units. *Id.* at 65,950 (quoting 16 U.S.C. 3103(c)). Section 103(c) does not bar application of the regulation at issue there, the Secretary reasoned, because a regulation written to apply to both public and private lands within park boundaries is not a regulation that applies "solely to public lands" within the parks. *Ibid.*

4. The Current Regulatory Framework

Under the national regulatory framework in place today, Park Service rules, which expressly apply to all navigable waters "located within the boundaries of the National Park System," 36 C.F.R. 1.2(a)(3), address such matters as pollution and sanitation, *e.g.*, 36 C.F.R. 2.14, the introduction and removal of fish, plants, and wildlife, *e.g.*, 36 C.F.R. 2.1, 2.2, 2.3, 2.5,

and sanitation and noise standards for boats and other vessels, *e.g.*, 36 C.F.R. 3.1-3.19. One such system-wide rule bars "operation or use of hovercraft." 36 C.F.R. 2.17(e).[6]

In addition to applying to persons on navigable waters within National Parks, Park Service rules generally apply to persons within "federally owned lands and waters" within National Parks, 36 C.F.R. 1.2(a)(1), but not to persons "on *non*-federally owned lands and waters or on Indian tribal trust lands located within National Park System boundaries," 36 C.F.R. 1.2(b) (emphasis added). The only circumstances in which park rules have been made generally applicable on private lands are those in which such application is necessary to fulfill the purpose of a NPS-administered interest (such as a federal easement), see 36 C.F.R. 1.2(a)(5), and the rare cases in which the Park Service has issued a regulation "specifically written to be applicable on such lands and waters," 36 C.F.R. 1.2(b). Under these principles, the Secretary has issued or proposed regulations applicable on private lands only in the case of activity on inholdings that poses a danger to park lands themselves. See 36 C.F.R. Pt. 6 (solid-waste disposal sites within National Park boundaries); 36 C.F.R. 9.1 (mining within National Park boundaries); see also 80 Fed. Reg. 65,572, 65,575 (Oct. 26, 2015) (proposed regula-

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[6] Hovercraft are vehicles that travel over land or water on fan-generated, pressurized air cushions. See 48 Fed. Reg. at 30,258. NPS promulgated its hovercraft rule after concluding (as maintained by commenters who supported the rule) that hovercraft would "introduce a mechanical mode of transportation into locations where the intrusion of motorized equipment by sight or sound is generally inappropriate." *Ibid.*

tion requiring permitting of oil and gas facilities operating on private lands within parks, based on evidence of "at least 10 instances of sites with oil spills or leaks resulting in contamination of soils and water").

B. The Proceedings In This Case

1. In 2007, Park Service rangers observed petitioner repairing a hovercraft inside the Yukon-Charley Rivers National Preserve (Yukon-Charley Preserve), a unit of the National Park System in Alaska. Petitioner was on a gravel bar adjoining the Nation River, a tributary of the Yukon. Pet. App. 8a & n.1. The rangers warned petitioner that hovercraft may not be operated in the Yukon-Charley Preserve, *ibid.*, because regulations prohibit "[t]he operation or use of hovercraft" on federally-owned land and on all navigable waters in National Parks, 36 C.F.R. 1.2(a)(3), 2.17(e).

Petitioner asserted that he was not required to comply with Park Service regulations because he was on a navigable river. Pet. App. 8a. Nevertheless, he removed his hovercraft from the Yukon-Charley Preserve, and refrained from using his hovercraft on waters within the Preserve during the next two hunting seasons. *Id.* at 8a-9a.

2. In 2011, petitioner filed suit in federal district court, challenging the Park Service's authority to enforce any park rules on navigable waters within National Parks in Alaska, and seeking declaratory and injunctive relief permitting hovercraft use on the navigable portions of the Nation River within the Yukon-Charley Preserve. He contended that the Park Service had been stripped of any ability to regulate navigable waters in National Parks throughout Alaska by Section 103(c) of ANILCA. See Pet. App. 36a, 52a-

53a; see also *id.* at 55a-57a. Respondents argued that navigable waters are not covered by Section 103(c) of ANILCA, and that in any event, the hovercraft rule applicable on all navigable waters within National Parks is not a "regulation[] applicable solely to public lands within" conservation system units. D. Ct. Doc. 84, at 11-24 (Mar. 8, 2013) (citation omitted); see Pet. App. 54a.

The district court granted summary judgment to respondents. Pet. App. 35a-58a. The court explained that the proper framework of review was that of *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), because the dispute involved a challenge to an agency's construction of a statute that it administers. Pet. App. 51a-52a. The court concluded that petitioner's claim failed at the first step of this analysis, because it was foreclosed by the plain statutory text. *Id.* at 52a, 56a-57a. Section 103(c), the court explained, exempted certain lands within "conservation system units" from rules that are "applicable solely to public lands within such units." *Id.* at 55a (citation omitted). That provision, the court concluded, did not affect the applicability of the Park Service's hovercraft rule, because it is not a rule "applicable solely to public lands within conservation system units." *Id.* at 57a. In light of that conclusion, the court stated that it need not decide whether the limitations of Section 103(c) are applicable on navigable waters in National Parks. See *id.* at 52a-54a.

3. A unanimous panel of the court of appeals affirmed. Pet. App. 3a-34a.

The court of appeals agreed with the district court that petitioner's challenge to the application of the Park Service's hovercraft rule on National Park wa-

ters was "foreclosed by the plain text" of Section 103(c). Pet. App. 7a. The court wrote that the first sentence of Section 103(c) clarified that "the boundaries of CSUs 'do[] not in any way change the status of that State, native, or private land' lying within those boundaries." *Id.* at 23a (brackets in original) (quoting 125 Cong. Rec. 11,158 (1979) (statement of Rep. Seiberling)). The second sentence, the court continued, limited federal regulatory authority over privately held lands in "conservation system units," by specifying that such lands "shall not be subject to 'regulations applicable solely to public lands within such units.'" *Id.* at 23a-24a (quoting 16 U.S.C. 3103(c)).

The court of appeals determined that the quoted text "unambiguously forecloses" petitioner's Section 103(c) challenge to application of NPS's hovercraft rule. Pet. App. 25a. That text, the court explained, "only exempts nonfederal land from 'regulations applicable *solely* to public lands within [CSUs].'" *Ibid.* (brackets in original) (quoting 16 U.S.C. 3103(c)). The hovercraft regulation, however, was "not so limited," because it "applies to all federal-owned lands and waters administered by NPS nationwide, as well as all navigable waters lying within national parks." *Id.* at 25a-26a.

Because the court of appeals resolved (Pet. App. 25a) petitioner's challenge on that ground, it concluded that it need not decide whether—as respondents argued, C.A. Br. 42-47—navigable waters within National Parks in Alaska are not among the private, Native, and State conveyances covered by Section 103(c). Pet. App. 26a & n.6; see *id.* at 34a.[7]

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[7] The court of appeals also ordered the dismissal, on standing grounds, of the State's complaint as an intervenor seeking to bring

SUMMARY OF ARGUMENT

ANILCA created and expanded National Parks, Wild and Scenic Rivers units, and other federal preserves in Alaska for stated purposes that include protecting "freeflowing rivers," "waters," and "fish." 16 U.S.C. 3101. Section 103(c) of that same enactment did not deprive the Secretary of the Interior of the ability to execute that directive through the regulation of navigable waters.

A. Navigable waters within National Parks in Alaska are not subject to the limitations in Section 103(c) of ANILCA. Section 103(c) addresses the treatment of lands that have been conveyed to the State, Native Corporations, and private parties, which it contrasts with "public lands." 16 U.S.C. 3103(c). It thus constrains the Park Service's regulation of the State, Native, and private inholdings that were brought within park boundaries when ANILCA drew boundaries around entire ecosystems. But Section 103(c) does not control the treatment of navigable waters, which were never conveyed to the State, Native Corporations, or private parties. And because the federal government holds title to interests in those waters under the doctrine of reserved water rights,

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its own challenge to NPS enforcement of park rules on navigable waters within National Parks in Alaska. See Pet. App. 9a-10a, 14a-20a. The district court had rejected the State's claims on the merits. *Id.* at 57a-58a. The court of appeals, however, concluded that the State lacked standing, because it had not shown injury to a legally protected interest from enforcement of the regulations. In particular, the court explained, the State had not shown any way in which the regulations interfered with any ongoing state activity, *id.* at 16a, and it "did not identify any actual conflict between NPS's regulations and its own statutes and regulations," *id.* at 17a.

the Park Service may regulate those waters consistent with ANILCA's definition of "public lands."

Other provisions of ANILCA confirm that Congress understood both that navigable waters would be "public lands" and that they would be subject to Park Service regulation. Congress demonstrated these understandings by creating parks for the specific purpose of protecting rivers; by setting forth a subsistence-use scheme that would make little sense if navigable waters were not public lands; and by constraining the Secretary's authority over particular types of fishing and boating. Congress's enactment of Section 103(c) as a subsection within ANILCA's "Maps" section, through a unanimous consent resolution making "corrections" to the bill, also confirms that Section 103(c) was not meant to bring about the sweeping withdrawal of Park Service authority that petitioner posits.

Chevron deference and congressional ratification would each defeat petitioner's position, even if the text and structure of ANILCA alone did not. The Secretary has reasonably concluded that ANILCA's subsistence-use priority, which is applicable only on "public lands," may be applied on navigable waters within National Parks. And the Park Service regulations reflecting that approach have been ratified by Congress. Further, the Secretary has also rejected by regulation petitioner's position that Section 103(c) bars application of park rules to navigable waters within the National Park System in Alaska.

B. Petitioner's challenge would lack merit even if navigable waters were subject to Section 103(c). By its terms, Section 103(c) has no effect on the circumscribed class of park rules that are permissibly writ-

ten to apply to lands within park boundaries regardless of whether they are federally owned. Section 103(c) specifies that Native, State, and private lands do not become public lands simply because they fall within park boundaries. 16 U.S.C. 3103(c). It then provides that Native, State, and private lands are not to be subject to a particular class of regulations: "regulations applicable *solely* to public lands within such [conservation system] units." *Ibid.* (emphasis added). This directive does not bar the Park Service from enforcing in Alaska the narrow class of parks rules applicable to *both* public and nonpublic lands within park boundaries, because such regulations are not, on any construction, "regulations applicable *solely* to public lands within" conservation system units. *Ibid.*

ANILCA elsewhere confirms that the Secretary retains the authority to regulate nonpublic lands within National Parks in Alaska under limited circumstances. ANILCA specifically directs the Park Service to consider "issuance and enforcement of regulations" governing activities in "privately owned areas" within the boundaries of National Parks in Alaska, where such regulation is needed to serve the purposes of the park unit as a whole. 16 U.S.C. 3191(b)(7). Congress would not have directed the Park Service to consider "issu[ing] and enforc[ing]" rules for privately owned areas if Section 103(c) barred the Secretary from issuing or enforcing such regulations. *Ibid.*

Statutory context and legislative history reinforce the limited scope of Section 103(c). Congress would not have adopted Section 103(c) as one of a number of mere "corrections" if it altogether eliminated a power to regulate inholdings that can be critical to the pro-

tection of park lands themselves. Nor would Members of Congress have characterized a withdrawal of the Park Service's limited but critical authority to apply rules on inholdings (which on petitioner's view include all navigable waters) as a minor change, unrelated to conservation areas.

If any ambiguity were present, *Chevron* deference would resolve it. In regulations in place for 20 years, the Secretary has interpreted Section 103(c) to constrain application only of regulations that are applicable "solely to public lands," and not of those regulations permissibly written to apply to nonpublic lands within park boundaries.

Petitioner is incorrect to suggest that the Secretary's understanding of Section 103(c) is unreasonable because it would allow the Park Service to subject private, State, and Native conveyances to pervasive regulation. The Park Service has only circumscribed authority to regulate lands that are within the boundaries of a National Park, but not part of the National Park itself. As a result, by clarifying that private, State, and Native conveyances are not public lands, Section 103(c) ensures that such inholdings have substantial protections against Park Service regulation.

Section 103(c) does not forbid the Park Service from making its hovercraft regulation (among other rules) applicable on navigable waters within National Parks. Congress has given the Secretary broad authority to regulate waters located within areas of the National Parks. Acting under that authority, the Park Service has adopted a regulation making park rules applicable on navigable waters in National Parks, without regard to ownership of land or waters. See 36 C.F.R. 1.2. A regulation designed in that way is not a

regulation applicable "solely to public lands" within park units. Accordingly, Section 103(c) does not bar the application of Park Service rules against hovercraft use on navigable rivers within National Parks in Alaska.

ARGUMENT

SECTION 103(c) OF ANILCA DOES NOT STRIP THE NATIONAL PARK SERVICE OF AUTHORITY TO ENFORCE RULES FOR NAVIGABLE WATERS WITHIN THE BOUNDARIES OF NATIONAL PARKS

ANILCA created and expanded National Parks, Wild and Scenic Rivers designations, Wildlife Refuges, and other federal preserves in Alaska for stated purposes that include protecting "freeflowing rivers," "waters," and "fish." 16 U.S.C. 3101. Section 103(c) of that same enactment did not deprive the Park Service of its ability to execute that directive through the regulation of navigable waters. Petitioner's view to the contrary rests on two errors. First, it erroneously treats navigable waters within National Parks as among the State, private, and Native lands described in Section 103(c). Second, it misunderstands the limits imposed by Section 103(c), which are not implicated by the rules that petitioner protests.

A. The Navigable Waters in National Parks Are Not Covered By The Limitations In Section 103(c)

Petitioner's challenge under Section 103(c) fails at the threshold, because navigable waters are not subject to the limitations in that provision. Not only is that the best understanding of Section 103(c), but it is the understanding adopted in the Secretary's formal rulemakings concerning both "public lands" and "navigable waters," and the understanding Congress rati-

fied in 1998 when it directed that the Secretary's "public lands" regulations should go into effect.

1. The navigable waters in National Parks do not fall within the terms of Section 103(c)

Section 103(c) addresses the treatment under ANILCA of lands that have been conveyed to the State, Native Corporations, and private parties, which the statute contrasts with "public lands." 16 U.S.C. 3103(c). Navigable waters within the National Park System are not subject to that provision. Such waters have never been conveyed to the State or any other party. And they are subject to regulation under ANILCA's definition of "public lands."

a. Navigable waters are not lands "conveyed to the State, to any Native Corporation, or to any private party"

Section 103(c) imposes limits on the Park Service's authority to regulate certain types of lands within National Parks in Alaska by providing that "[n]o lands which, before, on, or after" the date of ANILCA's enactment "are conveyed to the State, to any Native Corporation, or to any private party shall be subject to the regulations applicable solely to public lands within such units." 16 U.S.C. 3103(c).

Statutory language and context make clear this sentence's obvious application: It limits federal regulation of the State, Native, and private inholdings that were brought within the borders of conservation system units when ANILCA drew boundaries around entire ecosystems. See Pet. App. 22a. Those inholdings included lands that ANILCA was transferring to the State or Native groups as selections under ANCSA and the Statehood Act, see ANILCA §§ 901-

911, 94 Stat. 2430-2447, by means of what Congress described throughout ANILCA as "conveyances," see, *e.g.*, § 906, 94 Stat. 2437 (entitled "State selection and conveyances"); § 1406, 94 Stat. 2494 (entitled "Conveyance of partial estates"); § 1410, 94 Stat. 2496 (entitled "Interim conveyances and underselections"); § 1421, 94 Stat. 2509 (entitled "Conveyance to the State of Alaska"); § 1437, 94 Stat. 2546 (entitled "Conveyances to Village Corporations").

By its terms, however, that language does not affect the Park Service's longstanding authority to regulate navigable waters within National Parks—which, in contrast to Alaska's Statehood Act selections, are not lands "conveyed to the State." 16 U.S.C. 3103(c). Petitioner's basis for claiming that navigable waters within National Parks were conveyed to the State is the Submerged Lands Act. Pet. Br. 33. But—as its title indicates—the Submerged Lands Act provides that States generally hold "title to and ownership of the lands *beneath* navigable waters," and title to "the natural resources *within* such lands and waters," 43 U.S.C. 1311(a) (emphasis added), not title to the navigable waters themselves. That is because "[n]either sovereign nor subject can acquire anything more than a mere usufructuary right" in navigable waters. *Federal Power Comm'n* v. *Niagara Mohawk Power Corp.*, 347 U.S. 239, 247 n.10 (1954) (citation omitted); see *United States* v. *Gerlach Live Stock Co.*, 339 U.S. 725, 744-745 (1950) ("As long ago as the Institutes of Justinian, running waters, like the air and the sea, were *res communes*—things common to all and property of none."); *Federal "Non-Reserved" Water Rights*, 6 Op. O.L.C. 328, 365-366 (1982). The Submerged Lands Act thus does not transform the pro-

tection of inholdings contained in Section 103(c) into a retraction of traditional Park Service regulatory power over navigable waters in National Parks.

Petitioner's attempt to bolster his water-conveyance theory by pointing to the federal–state balance misunderstands that balance. Petitioner suggests that "[p]ermitting federal regulation of navigable waterways" notwithstanding "state ownership of the submerged lands beneath" would "subvert the public trust doctrine," which recognizes that "title to the lands under the navigable waters . . . necessarily carries with it control over the waters above them." Pet. Br. 36-37 (citation omitted). But while there is no dispute concerning the State's right to manage, develop, and use the natural resources within such lands and waters, see 43 U.S.C. 1311(a), petitioner is profoundly mistaken in suggesting that States have exclusive control of the navigable waters themselves, barring the exercise of all federal authority. To the contrary, this Court has explained that even when a State owns the submerged lands beneath a river, the federal government retains its own regulatory powers, including "the paramount power of the United States to control such waters" pursuant to the dominant federal navigational servitude, *PPL Mont., LLC* v. *Montana*, 132 S. Ct. 1215, 1228 (2012) (citation omitted); *United States* v. *Twin City Power Co.*, 350 U.S. 222, 224-225 (1956); the ability to utilize reserved rights "necessary for the beneficial use[] of * * * government property," *United States* v. *Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 703 (1899), and others, see *Alaska* v. *United States*, 545 U.S. 75, 116-117 (2005) (Scalia, J., concurring in part and dissenting in part) ("If title to submerged lands passed to

Alaska, the Federal Government would still retain significant authority to regulate activities in the waters of Glacier Bay by virtue of its dominant navigational servitude, other aspects of the Commerce Clause, and even the treaty power.").

b. The United States has title to interests in navigable waters within National Parks in Alaska

Section 103(c) provides that "[o]nly those lands within the boundaries of any conservation system unit which are public lands (as such term is defined in this Act) shall be deemed to be included as a portion of such unit"—thereby limiting regulation of lands that are not "public lands." 16 U.S.C. 3103(c). ANILCA defines "public lands" as "lands, waters, and interests therein" to which the United States holds title. 16 U.S.C. 3102(1)-(3); *Amoco Prod. Co.* v. *Village of Gambell*, 480 U.S. 531, 548 n.15 (1987).

This limitation in Section 103(c) provides no basis to challenge a regulation of navigable waters within National Parks, because the United States holds title to substantial "interests" in those waters by virtue of its reserved water rights. See *Gambell*, 480 U.S. at 549 n.15 (noting that under ANILCA, even if the federal government does not hold title to submerged lands on the Outer Continental Shelf, those lands may be "public lands" based on the United States' "interest" in such lands).

This Court has long held that federal land reservations include interests in appurtenant waters that are necessary to effectuate the purposes for which the land is reserved. *Cappaert* v. *United States*, 426 U.S. 128, 138 (1976) ("[W]hen the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by

implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation."); see *United States* v. *New Mexico*, 438 U.S. 696, 709-711 (1978) (reservation of water for National Park System units implied by broad conservation purposes of Organic Act). Those usufructuary water rights are property interests. *Niagara Mohawk Power Corp.*, 347 U.S. at 251 (Federal Water Power Act "treats usufructuary water rights like other property rights"); see *Gerlach Live Stock Co.*, 339 U.S. at 736 ("Congress has recognized the property status of water rights vested under California law."). Accordingly, "[t]he definition of public lands includes those navigable waters in which the United States has an interest by virtue of the reserved water rights doctrine." *Alaska* v. *Babbitt*, 72 F.3d 698, 703-704 (9th Cir. 1995), cert. denied, 576 U.S. 1036, and 517 U.S. 1187 (1986), adhered to *sub nom. John* v. *United States*, 247 F.3d 1032 (9th Cir. 2001) (per curiam).

As the Secretary of the Interior and the Secretary of Agriculture concluded in regulations promulgated pursuant to notice-and-comment procedures, under those principles, the United States has reserved water rights in the navigable waters that lie within National Parks. Congress has set out the purposes for which National Park lands are reserved in Alaska in the Organic Act and in ANILCA itself, in each case setting forth purposes that require the use of the waters appurtenant to park lands. In particular, the Organic Act provides that the Secretary is to manage parks for the "fundamental purpose" of conserving the scenery, natural objects, and wildlife therein. 54 U.S.C. 100101(a). And in ANILCA, Congress expressly stat-

ed that its purposes in reserving new lands to be administered under the Organic Act included safeguarding waters; protecting aquatic wildlife; preserving opportunities for marine recreation; and preserving opportunities for subsistence use, including subsistence fishing. 16 U.S.C. 3101.

In light of these purposes, the Secretary was correct—and certainly reasonable—in concluding that reserved water rights in navigable waters within the boundaries of National Parks are necessary to achieve the objectives of the relevant reservations. See 64 Fed. Reg. at 1279; 50 C.F.R. 100.3(b); see also 62 Fed. Reg. at 66,217-66,218 (proposed rule) (explaining doctrine of reserved water rights and considering alternative applications to waters within National Park units in Alaska). And because those reserved water rights constitute an "interest" in the navigable waters within the National Parks, such waters are part of the United States' "public lands" and are not removed from the sphere of permissible regulation by ANILCA Section 103(c). See *Gambell*, 480 U.S. at 548 n.15.

Petitioner does not dispute (Br. 38) that there are "reserved water rights held by the government" in the navigable waters of National Parks in Alaska. Nor does he take issue with the decisions treating "waters with associated federal reserved water rights [as] 'public lands'" for the "purpose of giving effect to ANILCA's subsistence provisions in Title VIII." *Ibid.* (citing *Katie John I*, 72 F.3d at 702 n.9, 704, and *John* v. *United States*, 720 F.3d 1214, 1245 (9th Cir. 2013) (*Katie John II*), cert. denied, 134 S. Ct. 1759 (2014)).

Instead, petitioner argues (Br. 38) that the federal reserved water rights in National Parks are merely

"related to subsistence" and that the attendant federal interest cannot form a basis for conservation-focused rules. That argument, however, misunderstands both the ANILCA framework and the nature of the government's reserved water rights. As to the ANILCA framework, the Park Service's authority to regulate "waters with associated federal reserved water rights" (Pet. Br. 38) under ANILCA simply reflects that the federal title to a property interest in those waters makes regulation of the waters a regulation of "public lands." 16 U.S.C. 3102(13); see *Gambell*, 480 U.S. at 548 n.15. So long as the government is regulating "public lands" under ANILCA, the limitations in Section 103(c) have no application. Petitioner's alternative approach, in which "waters with associated federal reserved water rights" would be "public lands" for some purposes, but not for others, cannot be squared with the structure of ANILCA, which sets out a single definition of "public lands" that applies across the statute's subsistence-use *and* conservation provisions. 16 U.S.C. 3102(3); see *Gambell*, 480 U.S. at 546 n.13 (single definition of "public lands" that applies across multiple ANILCA provisions).[8]

In any event, Congress's identification of the purposes of the land reservations in ANILCA leaves no room for petitioner's suggestion (Br. 38-39) that the

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[8] For his contrary view of ANILCA's operation, petitioner cites only *Cappaert*. But *Cappaert* did not address ANILCA at all. And the holding petitioner invokes—that when the government has reserved rights it may withdraw from appurtenant waters "only that amount of water necessary to fulfill the purpose of the reservation"—is irrelevant here, where the government is not seeking to withdraw waters, but rather to show that it has an "interest" in them. Pet. Br. 38 (citation omitted).

federal government has reserved water rights in the navigable waters of National Parks for purposes of subsistence use, but not for purposes of conserving park ecosystems, including park waters, rivers, and fish. Congress expressly identified each of those objectives as purposes of the reservations of land. See 16 U.S.C. 410hh, 3101. And it cannot seriously be contended that ANILCA's subsistence-use purposes require reservation of appurtenant waters, but its conservation purposes do not.

2. Other ANILCA provisions confirm that navigable waters within National Parks may be regulated as "public lands" under ANILCA

Other provisions of ANILCA strongly support the conclusion that Congress understood the United States to have the requisite interest in navigable waters to regulate them as public lands under ANILCA.

First, as noted above, Congress stated clearly (and repeatedly) that its purposes in placing new areas in Alaska under the Park Service's regulatory authority through ANILCA included "to protect and preserve * * * rivers," 16 U.S.C. 3101(b), to protect the "waters" in the new and expanded units, 16 U.S.C. 3101(a), and to preserve opportunities for canoeing and fishing on "freeflowing rivers," *ibid.* It did the same in its statement of purposes regarding the designation of particular units for inclusion in the National Park System, including in a number of designations that state an intent to protect particular navigable waters that it identified by name—including the "Aniakchak River," 16 U.S.C. 410hh(1), "the Kobuk River Valley, including the Kobuk, Salmon, and other rivers," 16 U.S.C. 410hh(6), and "the Noatak River," 16 U.S.C. 410hh(8), and "the entire Charley River

Basin," 16 U.S.C. 410hh(10). Those provisions demonstrate that Congress regarded rivers to be a central part of the National Parks themselves, rather than state-owned features outside of the parks.

Second, ANILCA's provisions relating to subsistence use demonstrate that Congress regarded navigable waters within the National Park System as public lands. Congress stated that it sought through ANILCA to "provide the opportunity for rural residents engaged in a subsistence way of life," 16 U.S.C. 3101(c), including "customary and traditional" fishing activities, 16 U.S.C. 3113, "to continue to do so." 16 U.S.C. 3101(c). It therefore provided that customary subsistence hunting and fishing activities would be allowed on "public lands"—*i.e.*, federal "lands, waters, and interests therein," 16 U.S.C. 3102(1)—within the National Park System, 16 U.S.C. 410hh-2, and that such subsistence fishing would be accorded priority over non-subsistence fishing on all "public lands," 16 U.S.C. 3114. Those provisions seeking to protect a "subsistence way of life"—and subsistence fishing in particular—would make little sense on petitioner's reading of "public lands" under ANILCA as excluding navigable waters, because subsistence fishing is an activity that "has traditionally taken place in navigable waters." *Katie John I*, 72 F.3d at 702; cf. *Alaska Pac. Fisheries* v. *United States*, 248 U.S. 78, 87-89 (1918) (concluding that tribe's erection of fish trap in navigable waters adjacent to reservation lands was permissible because those waters should be considered part of the reservation, in light of the reservation's purpose of facilitating subsistence hunting and fishing). Congress could not have "provide[d] the opportunity for rural residents engaged in a subsist-

ence way of life to continue to do so," 16 U.S.C. 3101(c), through a statute that did not protect the types of fishing that qualify as a subsistence way of life under the statute. Nor is it plausible that Congress would have created a detailed regulatory scheme to protect "subsistence fishing" that was applicable only in places where subsistence fishing does not traditionally occur.

In addition, a number of other provisions of ANILCA demonstrate that Congress intended that the Secretary would retain the authority to regulate navigable waters in National Parks in Alaska. Congress made clear that it understood the Secretary to have that authority in ANILCA's provisions designating particular areas as part of the National Park System in order to protect their rivers. It would be wholly unreasonable to suppose that Congress, in ANILCA, placed particular areas under National Park Service management so that the Secretary could protect their waters, see 16 U.S.C. 3101(a) and (b); 16 U.S.C. 410hh, but simultaneously deprived the Secretary of power to regulate all navigable portions of those waters to achieve that objective.

Other provisions of ANILCA further confirm that, at a minimum, Congress did not understand Section 103(c) to strip the Park Service of its power to regulate navigable waters. For instance, Title VI of ANILCA decrees that 26 rivers are "to be administered by the Secretary of the Interior" as "wild and scenic rivers" within either National Parks or Wildlife Refuges. §§ 601-603, 94 Stat. 2412-2414. Under the Wild and Scenic Rivers Act, a river that Congress designates to be "administered by the Secretary of the Interior through the National Park Service" is made

"part of the [N]ational [P]ark system," and it is to be administered pursuant to the "general statutory authorities relating to areas of the national park system," 16 U.S.C. 1281(c), for the purpose of "protect[ing] and enhanc[ing] the values which caused [the river] to be" so designated, 16 U.S.C. 1281(a). Designation of such rivers in Alaska as "wild and scenic" thus reflects Congress's understanding that the Park Service could in fact administer the rivers pursuant to its general statutory authorities. Such designations are inconsistent with a reading of Section 103(c) as forbidding the Park Service from regulating all *navigable* portions of those waters "as a portion of" any conservation system unit, including as a portion of any Wild and Scenic River System unit or any National Park System unit. See 16 U.S.C. 3102(4) (defining "conservation system unit" to include "any unit in Alaska of the National Park System" or of the "National Wild and Scenic Rivers Systems").

The many ANILCA provisions that confirm or constrain Park Service regulations of fishing or boating—without regard to navigability—further demonstrate that Congress understood that the Park Service's authority over those activities would remain in place. For example, ANILCA provides that:

- Motorboats may be used in conservation systems units "subject to reasonable regulations by the Secretary to protect the natural and other values of the conservation system units," 16 U.S.C. 3170; see 16 U.S.C. 3121 (permitting motor boats "on public lands");
- The Secretary may issue "regulations prescribing * * * restrictions relating to * * * fishing," 16 U.S.C. 3201; see 16 U.S.C. 3204;

- "[T]he Secretary may take no action to restrict unreasonably the exercise of valid commercial fishing rights or privileges obtained pursuant to existing law," 16 U.S.C. 410hh-4; and
- "Subject to reasonable regulation, the Secretary shall administer the [Yukon Delta National Wildlife] refuge so as to not impede the passage of navigation and access by boat on the Yukon and Kuskokwim Rivers," § 303(7)(D), 94 Stat. 2393.

None of those provisions suggests that the Secretary's ability to issue regulations turns on whether waters are navigable. And a number of them would be strange indeed if the statute applied only in non-navigable portions. For instance, it would be hard to make sense of a provision barring the Secretary from impeding "passage of navigation and access by boat on the Yukon and Kuskokwim Rivers" if the Secretary lacked authority over navigable waters, because the Yukon and Kuskokwim Rivers within the Yukon Delta Wildlife Preserve are navigable. See, *e.g.*, *United States* v. *Wilde*, No. 10-cr-21, 2013 WL 6237704 (D. Alaska Dec. 3, 2013), aff'd, 585 Fed. Appx. 336 (9th Cir. 2014) (noting that Yukon River is navigable); Bureau of Land Mgmt., *Final Summary Report: Federal Interest in Lands Underlying Kuskokwim River in the Kuskokwim Bay Subregion, Alaska* (May 2013), http://www.blm.gov/style/medialib/blm/ak/aktest/rdi/kuskokwimriv.Par.1507.File.dat/Kuskokwim%20River%20Final%20Report%205113.pdf.

Similarly, it is far-fetched to imagine that Congress would have found it necessary or appropriate to include statutory safeguards for motorboating and

commercial fishing if it believed the Park Service could regulate such activities only on non-navigable waters, especially in the absence of any evidence that motorboating or commercial fishing occur with any frequency on waters that are not navigable. And even if Congress had not made clear in these provisions that it understood the Secretary to have authority over boating and fishing in all park waters, petitioner's understanding of Section 103(c)'s implications for park waters would still be implausible. Because the State generally does not hold title to *non*-navigable stretches of rivers in National Parks and other conservation system units, petitioner appears to believe that Congress intended Section 103(c) to create a patchwork of jurisdiction, in which the Park Service would be free to regulate pursuant to its longstanding authorities over park waters on non-navigable stretches, but would be divested of authority by Section 103(c) where the waters became navigable.

There is no indication that Congress intended such an unworkable approach. Determinations of navigability relevant to the Submerged Lands Act are made "on a segment-by-segment basis," requiring an assessment of the usefulness of particular segments for purposes of trade and travel at the time of statehood. *PPL Mont.*, 132 S. Ct. at 1229. Those determinations are often difficult, and in Alaska, the remoteness of rivers and the fact that many rivers debouch from glaciers and flow shallowly across the landscape for some distance can make navigability determinations even more piecemeal and complex. Thus, as the State of Alaska has explained, seeking to determine the navigability of a particular stretch of river will commonly depend on gathering information that "is both

time consuming and expensive" to obtain, particularly in light of "Alaska's undeveloped and remote character"; require application of a navigability test that has been the subject of "a lot of disagreement" when applied "to the specific uses of Alaska's lakes, rivers and streams"; and yield an answer that is "always subject to legal challenge, since only the courts can authoritatively determine title to submerged lands." Alaska Dep't of Natural Res., Mining, Land & Water, *State Policy on Navigability*, http://dnr.alaska.gov/mlw/nav/nav_policy.htm (last visited Dec. 16, 2015). It is improbable that Congress would have intended to make the scope of federal authority over park waters turn on such costly and uncertain determinations.

Petitioner seeks support (Br. 37-38) for his conception of Section 103(c) as radically limiting Park Service power over waters from a separate ANILCA provision that addresses "existing rights" to "water resources." 16 U.S.C. 3207. But such an interpretation of Section 3207 is inconsistent with the ANILCA provisions discussed above, which are premised on federal regulatory authority over waters within the new and expanded National Parks. And it is inconsistent with the text of Section 3207, which seeks only to maintain existing federal and state authorities in particular water-related fields. The first portion of Section 3207 invoked by petitioner states that ANILCA does not "affect[] in any way any law governing appropriation or use of, or Federal right to, water on lands within the State of Alaska." 16 U.S.C. 3207(1). But neither petitioner nor the State identifies any law "governing appropriation or use of, or Federal right, to water" within Alaska that is displaced by the Park Service's regulation of such subjects as boating, fish-

ing, and hovercraft use on waters within the National Parks. *Ibid.* Similarly, the second sentence invoked by petitioner states that ANILCA should not be construed as "expanding or diminishing Federal or State jurisdiction, responsibility, interests, or rights in water resources development or control." 16 U.S.C. 3207(2). But the Park Service's exercise of jurisdiction and responsibility over navigable waters in National Parks *maintains* the allocation of regulatory authority, without expanding or diminishing it.

Moreover, the remainder of Section 3207 :dermines petitioner's understanding of Section 103(c) as contracting the Park Service's Organic Act and 1976 Act authorities over navigable waters within National Parks. The introductory clause of Section 3207 expressly states that nothing in ANILCA shall be construed as diminishing either "the power" or the "authority of the United States." 16 U.S.C. 3207. And Section 3207(3) specifies that ANILCA shall not be construed as repealing, modifying, or superseding any existing authority of an agency with "regulatory functions" in relation to "water resources" development—unless the repeal, modification, or superseder is "specifically set forth in this Act." 16 U.S.C. 3207(3). Yet if the Court were to accept petitioner's apparent view that Park Service authorities to regulate fishing, boating, and transportation are regulation of "water resources development" for purposes of Section 3207(2), then petitioner's authority-constricting interpretation of ANILCA would be foreclosed by Section 3207(3). His interpretation would supersede, modify, or repeal existing authorities as to what petitioner appears to consider "water resources development" with respect to park units in Alaska.

3. The addition of Section 103(c) as a "correction[]" confirms that it should not be construed to rescind the Park Service's authority

The placement of Section 103(c) provides an additional indication that it is not to be read as the sweeping withdrawal of the Park Service's authority to safeguard park waters that would result from petitioner's narrow reading of "public lands" in tandem with his expansive view of Section 103(c)'s preclusion.

Rather than placing the text of Section 103(c) in one of the ANILCA provisions setting forth or limiting the Secretary's substantive authority, Congress placed it in a section entitled "Maps." 16 U.S.C. 3103. Because Congress does not "hide elephants in mouseholes," *Whitman* v. *American Trucking Ass'ns*, 531 U.S. 457, 468 (2001), if Congress had designed Section 103(c) to rescind the Secretary's longstanding authority to regulate navigable waters in parks, refuges, and other preserves, it surely would not have made Section 103(c) a third subsection "buried in the 'maps' section" of the ANILCA statute. Pet. App. 42a.

Petitioner seeks to explain this placement by asserting that a "maps" section is a "'natural place to locate' a provision setting forth the regulatory regime that would apply to the territory being allocated in those maps." Pet. Br. 27 n.9 (citation omitted). That is not so, as even a glance at the substance of ANILCA's provisions reveals. Many ANILCA provisions are devoted entirely to "setting forth the regulatory regime," *ibid.*, that applies to territory within National Parks and other conservation system units. In contrast, the "maps" section is principally focused on the availability of physical maps themselves—through provisions requiring the Secretary to place unit maps

"on file and available for public inspection," 16 U.S.C. 3103(a), to arrange for maps and descriptions to be placed on file with Congress and published in the Federal Register, and to address "minor" adjustments of boundary lines, 16 U.S.C. 3103(b). That is an improbable place for a section that, as petitioner would have it, rescinded longstanding Park Service authority over the waters and rivers that ANILCA expressly sought to protect.

The manner in which Congress added Section 103(c) to ANILCA reinforces that conclusion. When ANILCA initially was passed by the Senate and House of Representatives, it left the Park Service's longstanding authority to regulate park waters in place by expressly directing the Secretary to "administer the lands, waters, and interests" within new and expanded National Parks "as new areas of the National Park System" under the provisions of the Organic Act. See 16 U.S.C. 410hh-2. Section 103(c) was then added to ANILCA, along with other modest changes, through a concurrent resolution. The text of the resolution explained that it contained only "corrections" to the bill that both Houses had passed. House Resolution 94 Stat. 3688. A "correction[]" would not be an apt description of a significant withdrawal of Park Service authorities. And it is improbable that a Congress seeking to achieve the purpose of protecting waters, rivers, and fish in new and expanded parks would have voted to rescind or rework Park Service authority to regulate navigable waters by a unanimous vote in this manner, just days after conferring the authority to regulate those waters on the Park Service. See 16 U.S.C. 410hh-2.

4. The legislative history also shows that Congress did not intend Section 103(c) to effect a sweeping withdrawal of Park Service authority

The legislative history confirms that Section 103(c) was not designed to make any broad change in the Secretary's authority over navigable waters. In offering the concurrent resolution that added Section 103(c) to ANILCA, the House sponsor emphasized that no portion of the resolution would "change any of the major features of the Alaska National Interest Lands Conservation Act" or "have the effect of altering provisions related to conservation areas." 126 Cong. Rec. at 30,498 (statement of Rep. Udall). And in both the House and Senate, Section 103(c) was labeled a "minor revision[]"—a label plainly inapplicable to an amendment that would rescind or revise longstanding authority to regulate navigable waters throughout National Parks, Wildlife Refuges, and Wild and Scenic Rivers in the State of Alaska. *Ibid.*, 126 Cong. Rec. 31,108 (1980); see 125 Cong. Rec. at 11,156 (statement of Rep. Seiberling) (describing amendment to add text of Section 103(c) to bill as "technical," "noncontroversial," and not a "substantive amendment[]").

Petitioner plumbs the legislative record (Br. 27-29) for statements in which Members of Congress set forth their views on ANILCA's distinction between "public lands" and "State, native, or private land" (Br. 29). But the statements on which petitioner relies are more relevant for what they do not say. Petitioner identifies no occasion at any point in ANILCA's history in which any Member of Congress suggested that the rivers and lakes ANILCA sought to protect would be treated as state inholdings under the statute. And

he identifies no point at which any Member suggested that ANILCA would alter the Park Service's longstanding authority to regulate such navigable waters. In contrast, Members indicated that they understood that ANILCA would enable federal park managers to safeguard the rivers placed within park units, as the statute itself makes pellucidly clear. See, *e.g.*, *Alaska National Interest Lands Conservation Act of 1979*, H.R. Rep. No. 97, 96th Cong., 1st Sess. Pt. I 457 (1979); 124 Cong. 14,673 (1978) (statement of Rep. Kostmayer); 125 Cong. Rec. 11,158 (1979) (statement of Rep. Bereuter).

5. The Secretary's reasonable interpretation of "public lands" is entitled to deference

If the Court were nevertheless to conclude that the text and structure of ANILCA do not unambiguously support the Secretary's regulatory authority here, the Secretary's reasonable regulations interpreting the term "public lands" in ANILCA are entitled to *Chevron* deference, and should be sustained. As petitioner acknowledges (Br. 21), the Secretary is entitled to deference to her reasonable interpretations of the scope of her authority under ANILCA. See *National Ass'n of Home Builders* v. *Defenders of Wildlife*, 551 U.S. 644, 666-667 (2007); *City of Arlington, Tex.* v. *Federal Commc'ns Comm'n*, 133 S. Ct. 1863, 1874 (2013).

On several occasions, the Secretary has adopted regulations expressly establishing that navigable waters are not subject to the limitations in Section 103(c). Regulations that implement the ANILCA "subsistence use" priority, which is applicable only on "public lands" in Alaska, reflect the reasonable conclusion that "public lands" include navigable waters

within National Parks in Alaska, by virtue of federal reserved water rights. See *Katie John I*, 72 F.3d at 703-704 (explaining and adopting Secretary's conclusion that "public lands" under ANILCA include waters in which the United States has "reserved water rights"); 64 Fed. Reg. at 1276 (identifying navigable waters within National Parks in Alaska as "Federal land units in which reserved water rights exist," and consequently as "public lands"). That reasonable conclusion is fatal to petitioner's argument that "navigable waters" are subject to the limitations in Section 103(c) for lands that are not "public lands."

Second, in 1996, the Secretary specified by regulation that park rules apply on navigable waters within the boundaries of all National Parks, rejecting the argument that Section 103(c) barred application of park rules to navigable waters in National Parks in Alaska. 61 Fed. Reg. at 35,133; see 36 C.F.R. 1.2(a)(3). The Secretary explained that those regulations codified the Park Service's longstanding practice. 61 Fed. Reg. at 35,133. And the Secretary rejected the "State of Alaska's contention that ANILCA § 103(c) preempts NPS's well-established authority on navigable waters." *Id.* at 35,133, 35,135. In particular, the Secretary explained, such an interpretation could not be sustained when Section 103(c) is read in light of "the context of the whole act," including its stated "underlying protective purposes: to protect objects of ecological, cultural, geological, historical, prehistorical, and scientific interest." *Id.* at 35,135. That construction—which is at a minimum a reasonable interpretation of the text in light of the statute as a whole—also compels rejection of petitioner's con-

struction of Section 103(c) as withdrawing the Park Service's authority over navigable waters.

6. Congress has ratified the Secretary's interpretation of "public lands"

Congress's subsequent ratification of the Secretary's subsistence-use regulations also defeats petitioner's construction of Section 103(c). Congress addressed, in several appropriations acts, the Secretary's proposed regulations that identified "public lands" based on reserved water rights. Congress made clear in doing so that it understood that the subsistence-use regulations implemented a construction of "public lands" in ANILCA as including "navigable waters in which the United States has reserved water rights as identified by the Secretary of the Interior." 1998 Appropriations Act § 316(b)(3), 111 Stat. 50 (adding Subsection (b) to 16 U.S.C. 3111 (1994)) (discussing *Katie John I*). Congress imposed temporary moratoria on the implementation of those regulations, affording the State an opportunity to enact a statute assuming control of the subsistence-use priority. See 1996 Appropriations Act § 336, 110 Stat. 1321-210; 1998 Appropriations Act § 316(a), 111 Stat. 50; 1999 Appropriations Act § 339(a)(1), 112 Stat. 2681-295. And it set forth modifications of the subsistence-use scheme (but not of the "public lands" definition) that would take effect if the State enacted a subsistence-priority statute. § 316(b), 111 Stat. 50.

Ultimately, however, after the State failed to enact a subsistence-use priority, Congress expressly directed that the subsistence-use regulations take effect, without any modification of their approach to "public lands." § 339, 112 Stat. 2681-296; see 16 U.S.C. 3102 note. Because the regulations Congress

ratified are premised on the treatment of navigable waters as regulable under ANILCA based on reserved water rights, Congress's ratification of those regulations refutes petitioner's contrary classification of navigable waters in this case.

B. The Park Service Rule Is Not Foreclosed By Section 103(c) In Any Event Because It Is Not A Rule "Applicable Solely To Public Lands" Within Conservation System Units

Even if the limitations in Section 103(c) applied to navigable waters, they would not prohibit the Park Service from adhering in Alaska to its longstanding approach of enforcing rules on navigable waters in order to protect park ecosystems. Section 103(c) prohibits subjecting State, Native, and private-held land to regulations "applicable solely to public lands" within conservation system units, but it does not disturb application of, at a minimum, the narrow class of regulations permissibly written to apply to *both* public lands and nonpublic lands within such units. Particularly because the Secretary has concluded as much in longstanding regulations entitled to *Chevron* deference, see 59 Fed. Reg. 65,948 (Dec. 22, 1994), petitioner's challenge to the application of the regulation in this case must fail.

1. Section 103(c) does not bar the Park Service from enforcing in Alaska the regulations that are applicable to public and nonpublic lands within National Park boundaries

The text of Section 103(c) and of ANILCA's management-plan section each unambiguously establishes that, at a minimum, ANILCA does not deprive the Park Service of its authority to apply within Alas-

ka the narrow but important class of park regulations, including the regulation at issue here, that are *not* "applicable solely to public lands" within National Parks in Alaska.

a. The plain text of Section 103(c) itself establishes that, at most, it forecloses application to conveyed land in Alaska of park rules solely for *public lands*—not rules for public and nonpublic lands alike within the National Parks. Its first sentence specifies that Native, State, and private lands do not become public lands simply because they fall within park boundaries. See 16 U.S.C. 3103(c) ("Only those lands within the boundaries of any conservation system unit which are public lands * * * shall be deemed to be included as a portion of such unit."). It thus establishes that the Park Service may not treat inholdings in Alaska as though they were themselves public lands, subject to the panoply of park rules applicable to such lands. Cf. Pet. Br. 23 (stating that the first sentence establishes that non-federal land is "not part of the National Park System" and that "NPS may not manage it as though it were"). But in the narrow circumstances in which the Park Service may and does regulate all lands within park boundaries—as expressly authorized under statutes concerning mining, solid-waste treatment sites, and navigable waters within National Parks—Section 103(c)'s first sentence does not by its terms forbid the Park Service from implementing regulations written without regard to land ownership.[9]

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[9] Congress has also recognized this distinction between lands that are merely "within the boundaries" of a National Park and the federal lands that actually constitute parts of the park in provisions concerning parks outside of Alaska. Compare 16 U.S.C. 392 (discussing "privately owned lands within the boundaries of the

The provision's second sentence provides no more support than the first for petitioner's view that Section 103(c) prohibits enforcement of *all* park rules on park inholdings—even the narrow class of park rules that apply to federal and non-federal land alike. The second sentence specifies that conveyances to States, Native Corporations, and private individuals are not to be subject to a particular class of regulations: the "regulations applicable *solely* to public lands within such [conservation system] units." 16 U.S.C. 3103(c) (emphasis added).

"[C]onservation system units" are expressly defined in ANILCA to refer to lands that are "in Alaska," 16 U.S.C. 3102(4). Accordingly, the second sentence of Section 103(c) is reasonably understood as a limit on rules "applicable solely to public lands," 16 U.S.C. 3103(c), within units that are "in Alaska," 16 U.S.C. 3102(4). Under that reading, it bars the Park Service from deviating through special rules in Alaska from the Park Service's well-settled regulatory regime, in which inholdings have long been treated differently than public lands within the parks. See 36 C.F.R. 1.2 (1967). In contrast, it has no effect on park rules that apply nationwide.

Even if the second sentence in Section 103(c) is read as petitioner would read it, however—as restricting "regulations applicable solely to public lands" in

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Hawaii National Park"); 16 U.S.C. 403-2 (discussing private land "within the authorized boundaries of" Shenandoah National Park) with 16 U.S.C. 403-1 (particular lands are "made a part of the Shenandoah National Park, subject to all laws and regulations applicable thereto"); 16 U.S.C. 403k-1 (converting "lands within the boundaries of Great Smoky Mountains National Park" into "a part of the national park").

any National Parks generally—the rule would afford no support for petitioner's position that Section 103(c) bars application of park rules (such as the navigable-waters provision at issue here), that are written to apply to *all* lands within park boundaries, rather than only to public land, see 36 C.F.R. 1.29(a)(3). That is because even if the word "solely" is read to modify only "public lands" (see Pet. Br. 27), Section 103(c) still preempts only those park regulations "applicable *solely* to public lands" within the parks. It has no effect on the narrow class of NPS regulations that are applicable to *both* public and nonpublic lands within park boundaries. 16 U.S.C. 3103(c) (emphasis added).

The third sentence of Section 103(c) likewise furnishes no support for petitioner's view. That sentence reinforces the distinction between the lands that are part of parks and the lands that are merely within park boundaries, by providing that if the State, a Native Corporation, or another owner lawfully conveys lands to the Secretary, those lands shall then "become part of the unit, and be administered accordingly." 16 U.S.C. 3103(c). That sentence thus again simply indicates that non-federal lands may not ordinarily be "administered" as though they were "part of the park." *Ibid.* But it does not remotely indicate that the Secretary lacks in Alaska the power he has elsewhere to adopt, in certain specific circumstances, regulations applicable on lands that are not themselves part of a National Park, but lie within its boundaries.

b. ANILCA elsewhere confirms this interpretation by directing the Secretary to consider adopting the types of regulations for nonpublic lands within National Parks that petitioner's reading of Section 103(c) would bar. In 16 U.S.C. 3191(b)(7), Congress directed

the Park Service to include in its management plans for each new or expanded National Park in Alaska a description "of privately owned areas, if any, which are within such unit"; a description "of activities carried out in, or proposed for, such areas"; and the "present and potential effects of such activities on such unit." *Ibid.* It then directs the Park Service to address in its plan "methods (such as cooperative agreements and *issuance and enforcement of regulations*) of controlling the use of such activities to carry out the policies of [ANILCA] and the purposes for which such [conservation system] unit is established or expanded." *Ibid.* (emphasis added). Congress would not have directed the Secretary to consider "issuance and enforcement of regulations" to address activities in "privately owned areas" in National Parks in Alaska if ANILCA altogether barred the Secretary from "issu[ing]" or "enforc[ing]" regulations within those areas. *Ibid.*; see pp. 35-39, *supra* (discussing ANILCA provisions establishing Congress's understanding that the Secretary would retain authority to regulate navigable waters within conservation system units).

c. The placement and context of Section 103(c) reinforce that conclusion. As discussed above, Congress chose not to place Section 103(c) in one of the numerous provisions in ANILCA that expand or constrain the Secretary's substantive authority over lands within the Parks. See pp. 41-42, *supra*. Instead, Congress placed Section 103(c) in a section called "[m]aps," with other provisions that address classification of lands, rather than setting out new substantive rules. And Congress enacted Section 103(c) under the label of "corrections" through a concurrent resolution adopted

by unanimous consent. See pp. 11, 42-43, *supra*. That placement and method of enactment reinforce the conclusion that Section 103(c) was not meant to deprive the Park Service in Alaska of the limited but critical authority it has elsewhere in the country to make some rules applicable to inholdings in order to protect park lands themselves.

2. The legislative history confirms that, at a minimum, park regulations that are applicable to both public and nonpublic lands are unaffected by Section 103(c)

The legislative history confirms that Section 103(c) creates no Alaska-specific rule that strips the Park Service of the ability to enforce rules on inholdings in the narrow class of circumstances in which the Park Service has permissibly specified that a rule is applicable to public and nonpublic land alike.

First, as discussed at pp. 42-43, *supra*, Section 103(c) was explained as a "minor revision[]" that would not "have the effect of altering provisions relating to conservation areas." 126 Cong. Rec. at 30,498; see 126 Cong. Rec. at 31,108; 125 Cong. Rec. at 11,156. But the section would indeed "alter[] provisions relating to conservation areas"—with the risk of exposing those areas to significant degradation—if it were read to bar application in Alaska of park rules permissibly written to apply to inholdings. When such rules are in place, they reflect the determination that certain potentially hazardous or polluting activity on nonfederal lands within park boundaries could place the public lands themselves at risk. See 36 C.F.R. Pt. 6 (solid-waste disposal sites within National Park boundaries); 36 C.F.R. Pt. 9 (mining within National Park boundaries); see also 80 Fed. Reg. at 65,572,

65,575 (proposed rule regarding permitting of oil-and-gas operations, in response to oil spills, leaks, and contamination from oil and gas facilities within park boundaries). Depriving the Park Service of the ability to enforce such rules on inholdings in Alaska would not be a "minor" change, or one unrelated to protections of "conservation areas." Such descriptions of Section 103(c) would be especially inapt if navigable waters were among the "state lands" that would be withdrawn entirely from Park Service regulatory authority, because protection of such waters within parks has long been central to the Park Service's conservation mission.

Moreover, in discussing ANILCA's definition of "public lands," Members of Congress explained that private inholdings *would* be subject to rules that apply to public and private lands alike. The Senate Report expressly stated that "[f]ederal * * * regulations of general applicability *to both public and private lands*" would be "unaffected by the passage of" ANILCA. *Alaska National Interest Lands*, S. Rep. No. 413, 96th Cong., 1st Sess. 303 (1979) (emphasis added). Conversely, as the court of appeals explained, Members of Congress routinely described the rules that would be inapplicable to inholdings as the rules for "public lands." Pet. App. 27a-28a (quoting Senate Report and floor statements); cf. Pet. Br. 28-29 (quoting similar statements).

3. The Secretary's construction of Section 103(c) as limiting only park rules "applicable solely to public lands" is entitled to deference

Because the Secretary has reasonably construed Section 103(c) to bar enforcement on private, State, and Native inholdings of only those park regulations

that are applicable solely to "public lands," petitioner's claim would fail under *Chevron* principles even if the statute were ambiguous.

a. In regulations that have been in effect for 20 years, the Secretary expressly rejected the position that Section 103(c) prohibits, in Alaska, the enforcement of park rules that are permissibly written to reach non-federal lands within park boundaries. Those regulations implemented a congressional directive that the Secretary promulgate regulations to address risks from the operation of solid-waste disposal sites "within the boundary of any unit of the National Park System." Act of Oct. 19, 1984, Pub. L. No. 98-506, 98 Stat. 2338. Implementing that mandate, the Secretary adopted regulations to guard against environmental harm from solid-waste disposal sites on all lands within park boundaries. See 59 Fed. Reg. at 65,948.

In making that solid-waste disposal regulation applicable to both public and nonpublic lands in National Parks nationwide (including in Alaska), the Secretary expressly rejected the argument that Section 103(c) required an Alaska exception. See 59 Fed. Reg. at 65,950. The Secretary explained that determining whether Section 103(c) mandated an Alaska exception required deciding whether Section 103(c) made regulations implementing the solid-waste statute "inapplicable to all non[-]federal lands in National Park Systems units in Alaska," or whether it "simply mean[t] that the non-federal lands are not to be administered as part of the conservation unit in the same manner as federal lands." *Ibid.*

The Secretary construed Section 103(c) to have the latter meaning. 59 Fed. Reg. at 65,950. The Secre-

tary explained that, as a result of "the presence of the word 'solely'" in Section 103(c), it does not bar the application in Alaska of park rules permissibly written to apply to "nonfederal lands in units of the National Park System." *Ibid.* Since the regulations being addressed are applicable to all lands "within the boundaries of any unit of the National Park System," the Secretary concluded that they do not "apply 'solely to public lands[']' within the units." *Ibid.* Because the Secretary's thorough analysis of Section 103(c)—one that has been in force for approximately 20 years—is, at a minimum, a reasonable reading of the statute, petitioner's contrary view should be rejected.

b. Petitioner is mistaken in contending (Br. 30-31) that the Secretary's interpretation of ANILCA would open inholdings to pervasive regulation by the Park Service. The Park Service does not have broad or plenary power to regulate those lands that fall within park boundaries but are not part of the park itself. The Organic Act, for example, permits only those regulations that are appropriately considered "necessary or proper" for use or management of the parks. 54 U.S.C. 100751(a). And setting aside the regulation of navigable waters, the only occasions on which the Secretary has regulated, or sought to regulate, *non*-public lands within National Parks in Alaska have involved limits on potentially hazardous or polluting activity necessary to protect *public* lands within the Parks. See pp. 16-18, *supra*.

Given the limitations of the Secretary's Organic Act authorities, Section 103(c) ensures substantial protection for private, State, and Native conveyances, by making clear that such conveyances are inholdings, and can only be regulated as such. It is petitioner's

view, in contrast, that produces strange results—by exposing National Parks in Alaska, but nowhere else in the country, to the risks of harm from hazardous activity on inholdings that the Park Service has adopted regulations to address.

4. The Park Service regulation making park rules applicable on navigable waters within the boundaries of National Parks is not barred by the limitations in Section 103(c)

Applying the foregoing principles, the limitations of Section 103(c) cannot bar the Park Service from prohibiting petitioner from using his hovercraft on the navigable waters within National Parks in Alaska.

Congress has expressly authorized the Secretary to adopt regulations that address navigable waters within National Parks, without regard to land ownership. It appears to have been undisputed that the Organic Act itself conferred authority on the Park Service to regulate navigable waters in National Parks—even though, under the Submerged Lands Act theory advanced by petitioner here, navigable waters would be state-owned lands in National Parks throughout the United States. Thereafter, Congress expressly authorized the Park Service to promulgate regulations of navigable waters within park boundaries, by granting the Secretary the expansive authority to issue regulations "concerning boating and other activities on or relating to waters located within [National Park] System units, including waters subject to the jurisdiction of the United States." 54 U.S.C. 100751(b). Navigable waters are waters subject to the jurisdiction of the United States. See *United States* v. *Rands*, 389 U.S. 121, 123 (1967); *United States* v. *Appalachian Elec. Power Co.*, 311 U.S. 377 (1940).

Acting on that statutory authorization, the Park Service has adopted a regulation specifying that park rules apply on all navigable waters, whether they constitute public lands or not. While Park Service rules generally apply only within the boundaries of "federally owned lands and waters," 36 C.F.R. 1.2(a)(1), the Park Service has written its regulation concerning navigable waters to apply to all navigable waters "located within the boundaries of the National Park System." 36 C.F.R. 1.2. That language was adopted for the express purpose of applying park rules to navigable waters, without regard to the resolution of any dispute concerning their ownership. 61 Fed. Reg. at 35,133.

Because that regulation is permissibly written to apply on both public and nonpublic lands within park boundaries, it would be unaffected by Section 103(c) even if navigable waters within National Parks were deemed entirely state-owned. The regulation would obviously be unaffected if Section 103(c) is understood to address enforcement only of those regulations that are "applicable solely to public lands within" park units in Alaska, 16 U.S.C. 3103(c), but not regulations applicable nationwide. There is no doubt that the Park Service acted here pursuant to nationally applicable authority, rather than Alaska-specific rules.

But the navigable-waters regulation is valid even if Section 103(c) is given a broader reading. Section 103(c) pertains only to the enforcement of regulations applicable "solely to public lands" within National Parks. The regulation extending park rules to navigable waters within National Parks is not such a regulation, but is instead one of the narrow class of regulations permissibly written to apply to both public and

nonpublic lands within park boundaries. Its enforcement is therefore unaffected by Section 103(c), even if navigable waters within National Parks were deemed state-owned land in which the federal government lacks any interest.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. 16 U.S.C. 3101 provides:

Congressional statement of purpose

(a) Establishment of units

In order to preserve for the benefit, use, education, and inspiration of present and future generations certain lands and waters in the State of Alaska that contain nationally significant natural, scenic, historic, archeological, geological, scientific, wilderness, cultural, recreational, and wildlife values, the units described in the following titles are hereby established.

(b) Preservation and protection of scenic, geological, etc., values

It is the intent of Congress in this Act to preserve unrivaled scenic and geological values associated with natural landscapes; to provide for the maintenance of sound populations of, and habitat for, wildlife species of inestimable value to the citizens of Alaska and the Nation, including those species dependent on vast relatively undeveloped areas; to preserve in their natural state extensive unaltered arctic tundra, boreal forest, and coastal rainforest ecosystems; to protect the resources related to subsistence needs; to protect and preserve historic and archeological sites, rivers, and lands, and to preserve wilderness resource values and related recreational opportunities including but not limited to hiking, canoeing, fishing, and sport hunting, within large arctic and subarctic wildlands and on free-

flowing rivers; and to maintain opportunities for scientific research and undisturbed ecosystems.

(c) Subsistence way of life for rural residents

It is further the intent and purpose of this Act consistent with management of fish and wildlife in accordance with recognized scientific principles and the purposes for which each conservation system unit is established, designated, or expanded by or pursuant to this Act, to provide the opportunity for rural residents engaged in a subsistence way of life to continue to do so.

(d) Need for future legislation obviated

This Act provides sufficient protection for the national interest in the scenic, natural, cultural and environmental values on the public lands in Alaska, and at the same time provides adequate opportunity for satisfaction of the economic and social needs of the State of Alaska and its people; accordingly, the designation and disposition of the public lands in Alaska pursuant to this Act are found to represent a proper balance between the reservation of national conservation system units and those public lands necessary and appropriate for more intensive use and disposition, and thus Congress believes that the need for future legislation designating new conservation system units, new national conservation areas, or new national recreation areas, has been obviated thereby.

2. 16 U.S.C. 3102 provides in pertinent part:

Definitions

As used in this Act (except that in titles IX and XIV the following terms shall have the same meaning as they have in the Alaska Native Claims Settlement Act [43 U.S.C. 1601 et seq.], and the Alaska Statehood Act)—

(1) The term "land" means lands, waters, and interests therein.

(2) The term "Federal land" means lands the title to which is in the United States after December 2, 1980.

(3) The term "public lands" means land situated in Alaska which, after December 2, 1980, are Federal lands, except—

(A) land selections of the State of Alaska which have been tentatively approved or validly selected under the Alaska Statehood Act and lands which have been confirmed to, validly selected by, or granted to the Territory of Alaska or the State under any other provision of Federal law;

(B) land selections of a Native Corporation made under the Alaska Native Claims Settlement Act [43 U.S.C. 1601 et seq.] which have not been conveyed to a Native Corporation, unless any such selection is determined to be invalid or is relinquished; and

(C) lands referred to in section 19(b) of the Alaska Native Claims Settlement Act [43 U.S.C. 1618(b)].

(4) The term "conservation system unit" means any unit in Alaska of the National Park System, National Wildlife Refuge System, National Wild and Scenic Rivers Systems, National Trails System, National Wilderness Preservation System, or a National Forest Monument including existing units, units established, designated, or expanded by or under the provisions of this Act, additions to such units, and any such unit established, designated, or expanded hereafter.

* * * * *

3. 16 U.S.C. 3103 provides:

Maps

(a) Filing and availability for inspection; discrepancies; coastal areas

The boundary maps described in this Act shall be on file and available for public inspection in the office of the Secretary or the Secretary of Agriculture with regard to the National Forest System. In the event of discrepancies between the acreages specified in this Act and those depicted on such maps, the maps shall be controlling, but the boundaries of areas added to the National Park, Wildlife Refuge and National For-

est Systems shall, in coastal areas not extend seaward beyond the mean high tide line to include lands owned by the State of Alaska unless the State shall have concurred in such boundary extension and such extension is accomplished under the notice and reporting requirements of this Act.

(b) Changes in land management status; publication in Federal Register; filing; clerical errors; boundary features and adjustments

As soon as practicable after December 2, 1980, a map and legal description of each change in land management status effected by this Act, including the National Wilderness Preservation System, shall be published in the Federal Register and filed with the Speaker of the House of Representatives and the President of the Senate, and each such description shall have the same force and effect as if included in this Act: *Provided, however*, That correction of clerical and typographical errors in each such legal description and map may be made. Each such map and legal description shall be on file and available for public inspection in the office of the Secretary. Whenever possible boundaries shall follow hydrographic divides or embrace other topographic or natural features. Following reasonable notice in writing to the Congress of his intention to do so the Secretary and the Secretary of Agriculture may make minor adjustments in the boundaries of the areas added to or established by this Act as units of National Park, Wildlife Refuge, Wild and Scenic Rivers, National Wilder-

ness Preservation, and National Forest Systems and as national conservation areas and national recreation areas. For the purposes of this subsection, a minor boundary adjustment shall not increase or decrease the amount of land within any such area by more than 23,000 acres.

(c) Lands included within unit; acquisition of land by Secretary

Only those lands within the boundaries of any conservation system unit which are public lands (as such term is defined in this Act) shall be deemed to be included as a portion of such unit. No lands which, before, on, or after December 2, 1980, are conveyed to the State, to any Native Corporation, or to any private party shall be subject to the regulations applicable solely to public lands within such units. If the State, a Native Corporation, or other owner desires to convey any such lands, the Secretary may acquire such lands in accordance with applicable law (including this Act), and any such lands shall become part of the unit, and be administered accordingly.

4. 54 U.S.C. 100101 provides in pertinent part:

Promotion and regulation

(a) IN GENERAL.—The Secretary, acting through the Director of the National Park Service, shall promote and regulate the use of the National Park System by means and measures that conform to the funda-

mental purpose of the System units, which purpose is to conserve the scenery, natural and historic objects, and wild life in the System units and to provide for the enjoyment of the scenery, natural and historic objects, and wild life in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.

* * * * *

5. 54 U.S.C. 100751 provides in pertinent part:

Regulations

(a) IN GENERAL.—The Secretary shall prescribe such regulations as the Secretary considers necessary or proper for the use and management of System units.

(b) BOATING AND OTHER ACTIVITIES ON OR RELATING TO WATER.—The Secretary, under such terms and conditions as the Secretary considers advisable, may prescribe regulations under subsection (a) concerning boating and other activities on or relating to water located within System units, including water subject to the jurisdiction of the United States. Any regulation under this subsection shall be complementary to, and not in derogation of, the authority of the Coast Guard to regulate the use of water subject to the jurisdiction of the United States;

* * * * *

6. 16 U.S.C. 410hh provides in pertinent part:

Establishment of new areas

The following areas are hereby established as units of the National Park System and shall be administered by the Secretary under the laws governing the administration of such lands and under the provisions of this Act:

* * * * *

(10) Yukon-Charley Rivers National Preserve, containing approximately one million seven hundred and thirteen thousand acres of public lands, as generally depicted on map numbered YUCH–90,008, and dated October 1978. The preserve shall be managed for the following purposes, among others: To maintain the environmental integrity of the entire Charley River basin, including streams, lakes and other natural features, in its undeveloped natural condition for public benefit and scientific study; to protect habitat for, and populations of, fish and wildlife, including but not limited to the peregrine falcons and other raptorial birds, caribou, moose, Dall sheep, grizzly bears, and wolves; and in a manner consistent with the foregoing, to protect and interpret historical sites and events associated with the gold rush on the Yukon River and the geological and paleontological history and cultural prehistory of the area. Except at such times when and locations where to do so would be inconsistent with the purposes of the preserve, the Secretary

shall permit aircraft to continue to land at sites in the Upper Charley River watershed.

7. 36 C.F.R. 1.2 provides in pertinent part:

Applicability and scope

(a) The regulations contained in this chapter apply to all persons entering, using, visiting, or otherwise within:

(1) The boundaries of federally owned lands and waters administered by the National Park Service;

(2) The boundaries of lands and waters administered by the National Park Service for public-use purposes pursuant to the terms of a written instrument;

(3) Waters subject to the jurisdiction of the United States located within the boundaries of the National Park System, including navigable waters and areas within their ordinary reach (up to the mean high water line in places subject to the ebb and flow of the tide and up to the ordinary high water mark in other places) and without regard to the ownership of submerged lands, tidelands, or lowlands;

(4) Lands and waters in the environs of the District of Columbia, policed with the approval or concurrence of the head of the agency having jurisdiction or control over such reservations, pursuant to the provisions of the Act of March 17, 1948 (62 Stat. 81);

(5) Other lands and waters over which the United States holds a less-than-fee interest, to the extent necessary to fulfill the purpose of the National Park Service administered interest and compatible with the nonfederal interest.

(b) The regulations contained in parts 1 through 5, part 7, and part 13 of this chapter do not apply on nonfederally owned lands and waters or on Indian tribal trust lands located within National Park System boundaries, except as provided in paragraph (a) or in regulations specifically written to be applicable on such lands and waters.

(c) The regulations contained in part 7 and part 13 of this chapter are special regulations prescribed for specific park areas. Those regulations may amend, modify, relax or make more stringent the regulations contained in parts 1 through 5 and part 12 of this chapter.

* * * * *

8. 36 C.F.R. 2.17 provides in pertinent part:

Aircraft and air delivery.

* * * * *

(e) The operation or use of hovercraft is prohibited.

* * * * *

No. 14-1209

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IN THE

Supreme Court of the United States

JOHN STURGEON,

Petitioner,

v.

BERT FROST, IN HIS OFFICIAL CAPACITY AS ALASKA REGIONAL DIRECTOR OF THE NATIONAL PARK SERVICE, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF CITED AUTHORITIES iii

INTRODUCTION 1

ARGUMENT 1

I. ANILCA Does Not Grant NPS Authority Over Any Nonfederal Lands Located In Alaska CSUs 1

A. ANILCA's text and structure contradict NPS's interpretation of Section 103(c) 2

B. ANILCA's purpose and history confirm that NPS's interpretation of Section 103(c) is unsustainable 6

C. NPS's strained interpretation is not entitled to *Chevron* deference 9

II. ANILCA Does Not Grant NPS Plenary Authority Over Navigable Waters Located Within CSU Boundaries 13

A. Navigable waters are not "public lands" under ANILCA as they have been "conveyed" to the State of Alaska 13

Table of Contents

Page

1. ANILCA's plain meaning and this Court's precedent foreclose NPS's interpretation of ANILCA 13

2. The clear statement rule forecloses NPS's interpretation of ANILCA 18

B. NPS does not have plenary authority over all navigable waters based on any reserved water rights it might possess 19

CONCLUSION 23

TABLE OF CITED AUTHORITIES

Page

CASES

Alaska v. Babbitt,
72 F.3d 698 (9th Cir. 1995) 18, 22

Alaska v. United States,
545 U.S. 75 (2005).....18

Amoco Prod. Co. v. Vill. of Gambell, Alaska,
480 U.S. 531 (1987).....7, 8

Arizona v. California,
373 U.S. 546 (1963).....20

Cappaert v. United States,
426 U.S. 128 (1976).....20, 21

Conn. Nat. Bank v. Germain,
503 U.S. 249 (1992).....5

Duncan v. Walker,
533 U.S. 167 (2001).....5

Gregory v. Ashcroft,
501 U.S. 452 (1991).....18

Idaho v. Coeur d'Alene Tribe of Idaho,
521 U.S. 261 (1997).....19

Idaho v. United States,
533 U.S. 262 (2001).....19

Cited Authorities

Page

Katie John v. United States,
247 F.3d 1032 (9th Cir. 2001).....20

Katie John v. United States,
720 F.3d 1214 (9th Cir. 2013).....20, 23

Mertens v. Hewitt Assocs.,
508 U.S. 248 (1993).....15

PPL Montana, LLC v. Montana,
132 S. Ct. 1215 (2012).....14, 17

SEC v. Chenery Corp.,
318 U.S. 80 (1943).....12

Solid Waste Agency of Northern Cook Cty. v. U.S. Army Corps of Engineers,
531 U.S. 159 (2001).....19

Totemoff v. State,
905 P.2d 954 (Alaska 1995).....14, 20

United States v. Alaska,
521 U.S. 1 (1997).....14

United States v. California,
436 U.S. 32 (1978).....14

United States v. New Mexico,
438 U.S. 696 (1978).....20

Cited Authorities

Page

United States v. Vogel Fertilizer Co.,
455 U.S. 16 (1982) 10

Utah Div. of State Lands v. United States,
482 U.S. 193 (1987) 19

Util. Air Regulatory Grp. v. EPA,
134 S. Ct. 2427 (2014) 4

Winters v. United States,
207 U.S. 564 (1908) 20

STATUTES AND OTHER AUTHORITIES

16 U.S.C. § 1274 17

16 U.S.C. § 1284(a) 17

16 U.S.C. § 1284(f) 17

16 U.S.C. § 1285b 17

16 U.S.C. § 17j-2 22

16 U.S.C. § 3101(d) 6

16 U.S.C. § 3102(1) 15

16 U.S.C. § 3102(3)(A) 15

Cited Authorities

Page

16 U.S.C. § 3103(a) 6

16 U.S.C. § 3103(c) 3, 4

16 U.S.C. § 3111(4) 22

16 U.S.C. § 3191(b)(7) 4

16 U.S.C. § 3192 ..... 4, 17

43 U.S.C. § 1635(o)(1) 5

43 U.S.C. § 1635(o)(2) 5

54 U.S.C. § 100751(a) 10

36 C.F.R. § 1.29(a)(3) 3

Alaska National Interest Lands Conservation Act, Pub. L. 96-487, 94 Stat. 2371 (1980) 6

General Regulation for Areas Administered by the National Park Service, 48 Fed. Reg. 30,252 (1983) 11

Omnibus Consolidated Emergency Supplemental Appropriations Act, Pub. L. 105-277, 112 Stat 2681 (1998) 16

Omnibus Consolidated Rescissions and Appropriations Act of 1996. Pub. L. 104-134, 110 Stat. 1321 (1996) 16

INTRODUCTION

The question here is straightforward: whether NPS has plenary authority to regulate nonfederal lands in Alaska CSUs as though they were part of the National Park System. Brief for Petitioner ("Br.") *i*. As NPS's decision to bury its discussion of that question confirms, the Ninth Circuit's ruling is indefensible. Brief for Respondent ("Resp.") 47-58. Section 103(c)'s fundamental point, as the statutory text, structure, purpose, and history make plain, is to deny NPS such authority.

Unable to defend the Ninth Circuit's decision, NPS devotes most of its attention to alternative arguments concerning its regulatory authority over navigable waters. But not only are all those arguments beyond the question presented, they were not decided below. Even if the Court reaches these questions, it will not assist NPS. NPS lacks statutory authority over nonfederal waters in CSUs for the same reasons it lacks authority over nonfederal inholdings: the United States does not hold title. Alaska navigable waters (like the submerged lands beneath them) were conveyed to Alaska when it joined the Union. Because the United States does not own these waters, NPS may not manage them as though it does.

ARGUMENT

I. ANILCA Does Not Grant NPS Authority Over Any Nonfederal Lands Located In Alaska CSUs.

The text, structure, purpose, and history of ANILCA demonstrate that Section 103(c) bars NPS from issuing the hovercraft rule. Br. 21-30. NPS's contrary arguments all miss the mark.

A. ANILCA's text and structure contradict NPS's interpretation of Section 103(c).

The decision below cannot be squared with Section 103(c)'s text and structure. Br. 21-27. The first sentence of Section 103(c) provides that only "public lands" are part of CSUs. The second provides that NPS may not regulate State, Native Corporation, and private lands within those CSUs. And the third provides that those lands may not be administered as part of the National Park System unless they are conveyed to the United States. Section 103(c) thus makes triply clear that nonfederal lands are not part of the CSUs that ANILCA created and are not subject to federal regulation as though they were.

NPS agrees with almost all of this. In particular, NPS agrees that Section 103(c)'s first sentence means that NPS "may not treat inholdings in Alaska as though they were themselves public lands," and the third sentence "indicates that non-federal lands may not ordinarily be 'administered' as though they were 'part of the park.'" Resp. 48, 50. Yet NPS argues that the second sentence somehow grants it limitless authority to regulate these nonfederal lands. This is incorrect.

First, NPS asserts that Section 103(c)'s second sentence "is reasonably understood as a limit on rules 'applicable solely to public lands' ... within units that are 'in Alaska.'" Resp. 49. In other words, while NPS may not impose "special rules" applicable only in Alaska, Section 103(c) "has no effect on park rules that apply nationwide." *Id.* But NPS offers no textual basis for its strained interpretation. Br. 26. Further, NPS does not even attempt to explain why Congress would have denied

nonfederal lands "within such units" the benefit of the many Alaska-specific "special rules" that relax nationwide park regulations. Br. 32. Yet that is the necessary consequence of NPS's interpretation.

Second, NPS argues that Section 103(c)'s limitation on authority over nonfederal lands can be overcome by federal rules "written to apply to *all* lands within park boundaries, rather than only to public land." Resp. 50 (citing 36 C.F.R. § 1.29(a)(3)). According to NPS, ANILCA limits its power only until it issues rules, like the hovercraft regulation, "applicable to *both* public and nonpublic lands within park boundaries." *Id.* Once NPS takes that step, Section 103(c) is no longer a barrier because the rule, quite conveniently, is no longer "applicable solely to public lands within such units." 16 U.S.C. § 3103(c).

NPS's argument is circular and renders Section 103(c) meaningless. It would allow NPS to control the extent of its own authority: the agency could regulate nonfederal land simply by issuing a regulation to that effect. It would defy logic—and contravene Congress's expressed intent—to interpret Section 103(c)'s second sentence to create a loophole under which NPS could evade any limit on its authority merely by extending a regulation to both federal and nonfederal lands. NPS should not be allowed to nullify Section 103(c) by violating it.

NPS's structural arguments are no stronger. Pointing to Section 1301, NPS claims that "ANILCA elsewhere confirms" that it retains authority to regulate nonfederal land. Resp. 23. But the provision cannot bear that weight. Section 1301 directs NPS to prepare unit management plans containing various categories of information. These

plans should include descriptions of privately-held lands within CSU boundaries, the purposes for which they are used, and descriptions "of methods (such as cooperative agreements and issuance or enforcement of regulations) of controlling the use of such activities to carry out the policies of this Act and the purposes for which such unit is established or expanded." 16 U.S.C. § 3191(b)(7). NPS contends that Congress would not have directed it to consider issuing such rules if it lacked authority to regulate private land. Resp. 23.

But NPS ignores the next section, Section 1302, which empowers it to acquire nonfederal lands in Alaska CSUs from State, Native Corporation, and private landowners. 16 U.S.C. § 3192. Once acquired, such lands "become part of the unit" and are "administered accordingly." *Id.* § 3103(c). Congress would not have needed to authorize acquisition of these nonfederal lands if NPS already possessed plenary regulatory authority over them.

More fundamentally, NPS would extrapolate from Section 1301's oblique reference to potential regulation of privately-held land the unfettered authority to regulate all private, Native Corporation, and State-owned lands in contravention of Section 103(c). NPS thus ignores the "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2441 (2014). Congress contemplated that NPS could regulate nonfederal lands located in CSUs by acquiring them, entering into a cooperative agreement with the owner, issuing rules pursuant to a specific grant of authority, or through a combination of these approaches. But the

overall statutory scheme is designed to ensure nonfederal lands are not regulated as though they were part of the National Park System. NPS's interpretation of Section 1301 would render Sections 1302 and 103(c) surplusage and thus should be rejected. *Duncan v. Walker*, 533 U.S. 167, 174 (2001).

Indeed, NPS ignores key structural aspects of ANILCA that refute its interpretation. Section 103(c) does not stand alone as an unexplained statutory anomaly. It works in tandem with Section 906(o), which provides that ANCSA land withdrawals are part of a CSU and are "administered accordingly" unless they were conveyed to a Native Corporation before ANILCA's enactment, or unless they are later conveyed to the State. 43 U.S.C. § 1635(o)(1). Section 906(o)(2) provides that "Federal lands within the boundaries of a conservation system unit ... shall be administered in accordance with the laws applicable to such unit" only "until conveyed" out of federal ownership. *Id.* § 1635(o)(2). Like Section 103(c), then, Section 906(o) draws a line between NPS management of federal and nonfederal lands. Br. 24-25. NPS makes no attempt to reconcile its argument with Section 906.

Last, NPS tries to downplay the importance of Section 103(c) by arguing that Congress would not have "buried" such a restriction in the law's Maps section. Resp. 41. This too is unpersuasive. Regardless of the section in which the restriction resides, it is federal law. The Court should decline NPS's invitation to assign less weight to statutory provisions based on their section headings or location. "[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Conn. Nat. Bank v. Germain*, 503 U.S. 249, 253-54 (1992).

Regardless, the Maps section is foundational. Br. 27 n.9. ANILCA is about geographic boundaries, and it relies on maps—rather than legal descriptions—to establish those boundaries. 16 U.S.C. § 3103(a) ("In the event of discrepancies between the acreages specified in this Act and those depicted on such maps, the maps shall be controlling."). Section 103 is ANILCA's third section, following only the preamble and the definitions. Even in the public law, the order of which differs in many ways from the codified version, Section 103 was third in line, following right after the sections discussing the nature and purpose of each new unit. ANILCA, Pub. L. 96-487, 94 Stat. 2371 (1980). The Maps section is thus far from "buried." It is difficult to imagine a more important and centrally-located provision than Section 103(c).

B. ANILCA's purpose and history confirm that NPS's interpretation of Section 103(c) is unsustainable.

ANILCA's purpose and history confirm Section 103(c)'s plain meaning. Br. 28-30. Like the Ninth Circuit, NPS attempts to rebut these arguments by focusing myopically on ANILCA's conservation goal and selectively examining the statute's legislative history.

NPS ignores that ANILCA balances *multiple* goals, including conservation, economic development, and self-sufficiency. For example, while purporting to list ANILCA's purposes, Resp. 7-8, NPS omits ANILCA's promotion of the "satisfaction of the economic and social needs of the State of Alaska and its people." 16 U.S.C. § 3101(d). Likewise, NPS downplays that ANILCA was an outgrowth of the Statehood Act and ANCSA—statutes

in which Congress sought to accommodate the unique needs of Alaskans—and that its "primary purpose was to complete the allocation of federal lands in the State of Alaska." *Amoco Prod. Co. v. Vill. of Gambell, Alaska*, 480 U.S. 531, 549 (1987).

Petitioner's interpretation, in contrast, balances conservation *and* Alaska's economic and social needs. Br. 30. ANILCA added over 100 million acres to CSUs, newly placing vast swaths of land under NPS control. At the same time, however, Congress declined to grant NPS authority over nonfederal lands within these new CSUs in order to remain faithful to the economic development purposes of the Statehood Act and ANCSA—statutes that granted these lands to the State and Native Corporations for their own use. Br. 19. ANILCA must be interpreted in a way that is most consistent with all of Congress's purposes, not just the one that advances NPS's regulatory agenda.

In its rush to seize self-authorized regulatory authority, NPS refuses even to acknowledge ANCSA and recognize how it bears on the proper interpretation of ANILCA. Over 18 million acres of ANCSA land selections lie within CSUs. Br. of Arctic Slope Reg'l Corp. et al. as Amici Curiae 8 ("ASRC"); Br. of Doyon, Ltd. et al. as Amici Curiae 3 ("Doyon"). The revenues from these lands are essential to Native Corporations' economic health and to ensuring their native shareholders' self-sufficiency. ASRC 14. Restrictive NPS regulation on Native Corporation lands thus would contradict ANCSA's purposes and could be financially catastrophic. Commercial activity and scientific research would be subject to federal control, impeding any efforts by ANCSA shareholders

to productively utilize their lands—whether for mineral development, oil and gas exploration, nature lodges, trail construction, or building camping sites. *Id.* 12-14; Doyon Br. 4.

The social and practical ramifications would be significant as well. Building construction, hunting, fishing, gathering berries, and access via air and water would all require federal approval; even public meetings would be subject to a federal permitting process. ASRC 11-12. And the takeover of these lands has already begun: relying on the decision below, NPS proposed regulations extending federal oil and gas permitting regulations to previously exempt ANCSA lands in CSUs. *Id.* 13; Doyon 5-6.

NPS's approach to ANILCA's history is equally flawed, which overwhelmingly supports Petitioner's interpretation of the statute. Br. 28-29. All NPS can point to in support of its characterization of Section 103(c) as a "minor technical correction" that had no "substantive" impact is a partial quotation from Representative Udall. Resp. 43. Even if this quotation were accurate and probative, it would still fail to reconcile NPS's interpretation with the overall context that led to the introduction and inclusion of the language that became Section 103(c). "The central issue of [ANILCA's] floor debates was the appropriate balance between exploitation of natural resources, particularly energy resources, and dedication of land to conservation units." *Amoco Prod.*, 480 U.S. at 553.

But NPS omits important aspects of Representative Udall's statements. As one of the law's sponsors, Mr. Udall had explained that ANILCA's inclusion of ANCSA lands

within CSU boundaries would not subject them to federal regulation. 125 Cong. Rec. 9,905 (1979); Br. 7-8. When H.R. 452 (the concurrent resolution that reinserted Section 103(c)) was introduced, Representative Udall reassured Congress that the resolution would not materially change ANILCA—including, presumably, protection of ANCSA and other nonfederal lands from federal regulation. To be sure, Representative Udall characterized H.R. 452 as containing changes that were "technical or perfecting in nature." 126 Cong. Rec. 30,498 (1980). But NPS omits that Representative Udall also described other statutory changes as "more extensive." *Id.*[1]

C. NPS's strained interpretation is not entitled to *Chevron* deference.

NPS's plea for agency deference should be rejected. Br. 30-32. The statute is unambiguous. NPS continues to advocate for an interpretation of Section 103(c) that is contrary to its text, relies on circular logic, and ignores Congress's clear commitment to ensuring that nonfederal lands within CSUs would not be regulated as though they were part of the National Park System. Further, NPS's interpretation would lead to absurd results, Br. 31-32, and would not only undermine Congress's goals in passing ANILCA, but would undermine ANCSA and the Statehood Act. In short, NPS's interpretation of Section 103(c) is unreasonable.

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1. Section 103(c) also was not an unimportant last-minute addition. Resp. 43. The language traces back to one of the earliest versions of ANILCA. Br. 9-10 & n.2. It had dropped out during reconciliation, but was restored by H.R. 452. *Id.*

None of NPS's arguments alters this conclusion. Even though Section 103(c) is designed to *limit* NPS's authority over nonfederal land, NPS interprets it to impose no limit on federal authority to regulate nonfederal lands within CSUs. NPS insists that its claim for expansive authority is not "pervasive" because the agency may impose only those regulations "'necessary or proper' for use or management of the parks." Resp. 55 (quoting 54 U.S.C. § 100751(a)). But that is just another way of saying that NPS believes that Congress gave it a blank jurisdictional check, and that ANILCA imposes *no* limit beyond that imposed by the Organic Act over the "System units" themselves. 54 U.S.C. § 100751(a). Any construction of Section 103(c) permitting NPS to regulate nonfederal lands in CSUs as though they were part of the National Park System is, by definition, unreasonable. *United States v. Vogel Fertilizer Co.*, 455 U.S. 16, 26 (1982) ("The challenged Regulation is not a reasonable statutory interpretation unless it harmonizes with the statute's origin and purpose.").

Thus, when NPS insists that its authority over Alaska nonfederal lands is "narrow," Resp. 23, 47-50, 52, 57, or applicable in "certain specific circumstances," Resp. 50, it means only that the agency believes that it has chosen to exercise the vast authority it claims for itself in that fashion. NPS identifies no limiting principle on the exercise of its claimed regulatory authority other than its own assurance that it will use its nearly unfettered discretion wisely. But NPS's self-serving assurance that it will use its power judiciously is not what ANILCA requires. Congress, quite correctly, understood that Alaskans have exceptional economic, social, and transportation needs, and that subjugating nonfederal lands to pervasive NPS management would hinder the State's ability to meet these needs.

This case illustrates the point. NPS has not sought to prohibit state-licensed hovercraft on nonfederal lands in Alaska CSUs "to protect *public* lands within the Parks" from "potentially hazardous or polluting activity." Resp. 55. NPS banned them because, in its view, hovercraft utilize "'motorized equipment'" that is "'by sight or sound ... generally inappropriate.'" Resp. 17 n.6 (quoting General Regulation for Areas Administered by the National Park Service, 48 Fed. Reg. 30,252, 30,258 (1983)). Subject to the constraints of the Organic Act, NPS was free to draw that conclusion for the National Park System. But the point of Section 103(c) was to ensure that this kind of routine policy choice would be made by the State—not NPS—when it came to nonfederal lands. Br. of Alaska as Amicus Curiae at 8-22.

Moreover, NPS's promise to exercise restraint in regulating nonfederal lands is belied by its recent actions. Less than a year after the decision below, NPS invoked it to restrict oil and gas development rights to nonfederal land in Alaska. Br. 31. Nor is NPS the only agency seizing on the ruling. Department of the Interior Fish and Wildlife Service, Management of Non-Federal Oil and Gas Rights, Proposed Rule, 80 Fed. Reg. 77,200 (Dec. 11, 2015). These attempts to impose the entirety of the NPS oil and gas regime on nonfederal land in Alaska CSUs is far from the kind of "narrow" power NPS claims to need. There is little doubt that, if left unchecked, NPS will wield its newfound power over nonfederal land in Alaska CSUs to the maximum possible extent.

Finally, NPS points to solid waste regulations from two decades ago to characterize its reading of Section 103(c) as "longstanding." Resp. 54-55. However, an

impermissible interpretation does not become reasonable because it has been around for 20 years. The rationale NPS offered there is the same circular interpretation that NPS offers here. It adds nothing to this case.[2]

Regardless, the solid waste regulations are irrelevant to Section 103(c) as they were issued pursuant to specific congressional authorization passed *after* ANILCA. In 1984, Congress expressly prohibited solid waste sites "within the boundary of any unit of the National Park System." 16 U.S.C. §§ 460l-22(c). In 1994, NPS acknowledged that it was acting under authority created by this statute. Solid Waste Sites in Units of the National Park System, 59 Fed. Reg. 65,948 (Dec. 22, 1994). To the extent, then, that these rules are a proper exercise of NPS's authority under this more recent statute—a subject on which Petitioner takes no position—the regulations in no way bolster NPS's claim of agency deference here.

By contrast, the hovercraft regulation was not issued pursuant to any specific subsequent congressional grant of authority. As NPS acknowledges, it was issued pursuant to NPS's general management authority under the Organic Act. Resp. 17. For all the reasons set forth above and in the opening brief, that regulation therefore relies upon an impermissible construction of Section 103(c) and is not in accordance with law.

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2. The explanations also were not offered or otherwise incorporated into this rulemaking. NPS is not entitled to deference based on a rationale that was not articulated when the regulations were issued. *SEC v. Chenery Corp.*, 318 U.S. 80, 95 (1943).

II. ANILCA Does Not Grant NPS Plenary Authority Over Navigable Waters Located Within CSU Boundaries.

Even though the Ninth Circuit assumed "the waters of and lands beneath the Nation River have been 'conveyed to the State' for purposes of § 103(c)," Petition Appendix 26a, NPS asks this Court to decide the issue in the first instance. NPS's construction of the statute is untenable in any event. First, navigable waters are not "public lands" because the United States does not hold "title" to them; they were "conveyed" to Alaska and are therefore insulated from NPS regulation by Section 103(c). Even if this question were close, the clear statement rule would foreclose NPS's interpretation. Second, the reserved water rights doctrine, assuming it has any role to play, does not confer on NPS plenary regulatory authority over Alaska navigable waters based on an amorphous "conservation" rationale.

A. Navigable waters are not "public lands" under ANILCA as they have been "conveyed" to the State of Alaska.

1. ANILCA's plain meaning and this Court's precedent foreclose NPS's interpretation of ANILCA.

NPS incorrectly contends that navigable waters are beyond Section 103(c)'s purview because they are "public lands" under ANILCA. Resp. 29-33. ANILCA defines "public lands" to mean "Federal lands" and defines "Federal lands" to mean, in turn, "lands the *title* to which is in the United States after December 2, 1980." 16 U.S.C.

§§ 3102(2)-(3) (emphasis added). NPS's argument thus fails at the outset because the United States does not hold title to these navigable waters. Br. 33-38.

"In 1842, the Court declared that for the 13 original States, the people of each State, based on principles of sovereignty, *hold the absolute right to all their navigable waters* and the soils under them, subject only to rights surrendered and powers granted by the Constitution to the Federal Government." *PPL Montana, LLC v. Montana*, 132 S. Ct. 1215, 1227 (2012) (citation omitted) (emphasis added). The Court eventually extended "the same principle" to the "States later admitted to the Union, because the States in the Union are coequal sovereigns under the Constitution." *Id.* Given this precedent, NPS's assertion that any federal regulatory authority it might possess eclipses Alaska's claim to title fails as a matter of original understanding. Resp. 28-29.

But even if Alaska does not hold title to the navigable waters themselves, the United States certainly does not. Alaska has indisputable title to the submerged lands beneath them. Br. 35-38. The Submerged Lands Act grants States "title to and ownership of the submerged *lands and waters*," including "the right and power to manage, administer, lease, develop, and use them." *United States v. California*, 436 U.S. 32, 40 (1978) (citation omitted) (emphasis added); *United States v. Alaska*, 521 U.S. 1, 5 (1997); *Totemoff v. State*, 905 P.2d 954, 964 (Alaska 1995). Accordingly, NPS is doubly wrong. Not only does the United States lack title to these navigable waters, but Alaska's title to the submerged lands pursuant to the Submerged Lands Act means that these are "lands granted to" Alaska "under any other provision of Federal

law." 16 U.S.C. § 3102(3)(A); *id.* § 3102(1) ("The term 'land' means lands, waters, and interests therein.").

NPS counters that the hovercraft regulation does not violate Section 103(c) because navigable waters have never been "conveyed" to Alaska regardless of the dispute over who (if anyone) holds title. Resp. 26-28. That argument fails for the same reasons. NPS concedes, as it must, that the submerged lands were conveyed to Alaska. Resp. 27. NPS's novel attempt to sever Alaska's submerged lands from the navigable waters flowing above them has no foundation in ANILCA, which, as noted above, defines "land" to include "waters." Br. 35-37.

Having found no solid footing in the statute's text, NPS turns to purpose. Specifically, NPS claims that Petitioner's interpretation of ANILCA contravenes Congress's stated purpose of protecting rivers. Resp. 33-34. But "vague notions of a statute's 'basic purpose' are ... inadequate to overcome the words of its text regarding the *specific* issue under consideration." *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 261 (1993). In addition, NPS continues to ignore that ANILCA serves multiple purposes, including Alaska's right to control its land and water, and that Alaska—like NPS—has an interest in safeguarding natural resources. ANILCA must be construed to harmonize all of Congress's purposes. *Supra* at 6-7. There is nothing dissonant about ANILCA protecting federal waters and watersheds, while simultaneously preserving Alaska's sovereignty over its navigable waters.

NPS also incorrectly claims that a textual approach to Section 103(c) is inconsistent with statutory provisions directed at certain boating and fishing activities that

can occur on navigable waters. Resp. 36-37. But those other provisions still apply to federal waters, to navigable waters where the submerged lands were conveyed to the United States, or where the State has agreed to federal management. Furthermore, these provisions may apply in pre-statehood withdrawals, such as the McKinley (now Denali), Glacier Bay, and Katmai National Parks, where in some circumstances the federal government retains an interest in submerged lands. *Alaska*, 521 U.S. at 56-57. The fact that these statutory provisions do not have the sweeping reach NPS would prefer does not mean that enforcing ANILCA's plain meaning would lead to an anomaly.[3]

NPS's claim that respecting Alaska's authority over its navigable waters would create an unworkable jurisdictional "patchwork" also is unpersuasive. Resp.

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3. NPS's claim that Congress ratified its interpretation of ANILCA fails too. Resp. 46-47. Congress imposed a series of moratoria on federal management of subsistence to allow Alaska time to consider enacting its own subsistence regime. But Congress was careful not to weigh in on this matter. Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. 104-134, § 336, 110 Stat. 1321 (1996) ("None of the funds made available to the Department of the Interior or the Department of Agriculture by this or any other Act may be used to issue or implement final regulations, rules, or policies pursuant to Title VIII of [ANILCA] to assert jurisdiction, management, or control over navigable waters transferred to the State of Alaska pursuant to the Submerged Lands Act of 1953 or the Alaska Statehood Act of 1959."); Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. 105-277, § 339(d), 112 Stat 2681 (1998) ("Nothing in this section invalidates, validates, or in any other way affects any claim of the State of Alaska to title to any tidal or submerged land in Alaska.").

38. ANILCA's exclusion of private, Native Corporation, and State lands and waters from CSUs, and thus from NPS jurisdiction, expressly creates this "patchwork." This is hardly a unique issue. A map of Alaska, or any state, reveals lands and waters of varying ownership and jurisdictional status. This is the inherent nature of the federal system and private ownership of property. This type of jurisdictional "patchwork" often occurs, for example, under the Wild and Scenic Rivers Act because, among other reasons, only designated portions of rivers qualify for inclusion under that statute. 16 U.S.C. § 1274. It also is a function of the fact that navigability must be determined on a "segment by segment basis." *PPL Montana*, 132 S. Ct. at 1229. Fully aware of these issues, Congress delegated NPS authority to acquire nonfederal land through voluntary sale. 16 U.S.C. § 3192. Such authority would be unnecessary if NPS's regulatory power in CSUs were uniform.[4]

At base, NPS's reasoning turns on a mistaken premise. NPS bristles at the idea that Petitioner seeks to "strip the Park Service of its power to regulate navigable waters." Resp. 35. But that has never been Petitioner's position. NPS may regulate navigable waters under

4. NPS also misunderstands the Act more generally. NPS suggests that ANILCA's designation of certain Alaskan rivers under that statute proves that Alaska's navigable waters are "public lands" and thus beyond the reach of Section 103(c). Resp. 35-36. But the statute acknowledges and protects State ownership rights in submerged lands, 16 U.S.C. § 1284(f), and preserves State authority over fish and wildlife, *id.* § 1284(a). Further, Section 606(a) amended the Act to specify that, in Alaska, the acreage included with the designation cannot include either "private lands" or "lands owned by the State." *Id.* § 1285b.

specific grants of authority such as the Clean Water Act. Br. 26-27. Congress also possesses "significant authority to regulate activities" in navigable waters "by virtue of [the United States'] dominant navigational servitude, other aspects of the Commerce Clause, and even the treaty power." *Alaska v. United States*, 545 U.S. 75, 116-17 (2005) (Scalia, J., concurring in part and dissenting in part). What Petitioner challenges is NPS's claim of delegated authority over State-owned waters under its generic management authority. ANILCA forecloses that expansive claim of NPS's authority. "Neither the language nor the legislative history of ANILCA suggests that Congress intended to exercise its Commerce Clause powers over submerged lands and navigable Alaska waters." *Alaska v. Babbitt*, 72 F.3d 698, 703 (9th Cir. 1995).

2. The clear statement rule forecloses NPS's interpretation of ANILCA.

Even if ANILCA were ambiguous, NPS's interpretation would still be impermissible. As the Court has explained, "if Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (citation omitted). The clear statement rule requires that any impingement on state sovereignty be "plain to anyone reading the [statute]." *Id.* at 467. In so doing, the rule upholds a foundational principle: "the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere." *Id.* at 461.

The clear statement rule plainly applies here. "Due to the public importance of navigable waterways, ownership of the land underlying such waters is strongly identified with the sovereign power of government." *Idaho v. United States*, 533 U.S. 262, 272 (2001) (citation omitted). As the Court has explained, a State's control of its navigable waters is "an essential attribute of sovereignty" because it affects "the sovereign's ability to control navigation, fishing, and other ... activity on rivers and lakes." *Utah Div. of State Lands v. United States*, 482 U.S. 193, 195 (1987); *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 284 (1997) (explaining "navigable waters uniquely implicate sovereign interests").

NPS's interpretation of ANILCA cannot overcome the clear statement rule. Resp. 44-46. ANILCA clearly supports Petitioner's reading. Even if it did not, however, it certainly would not be "plain to anyone reading the statute" that navigable waters either are "public lands" or were not "conveyed" to Alaska when it joined the Union. Accordingly, there is no basis for deferring to the agency. The Court will not "extend *Chevron* deference" where, as here, the "administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power" without "a clear statement from Congress." *Solid Waste Agency of Northern Cook Cty. v. U.S. Army Corps of Engineers*, 531 U.S. 159, 172-74 (2001).

B. NPS does not have plenary authority over all navigable waters based on any reserved water rights it might possess.

NPS argues that navigable waters are "public lands" based on "substantial 'interests' in those waters by

virtue of its reserved water rights." Resp. 29. But that cannot be correct. The reserved water rights doctrine does not confer "title." As NPS acknowledges, Resp. 27, it establishes a non-possessory *use* right. *Totemoff*, 905 P.2d at 965 ("Reserved water rights give the federal government the right to prevent others from appropriating water or to use a certain volume of water, not to possess a body of water."); *Katie John v. United States ("Katie John II")*, 247 F.3d 1032, 1047 (9th Cir. 2001) (en banc) (Kozinski, J., dissenting) (explaining that "a usufructuary right does not give the United States *title* to the waters or the lands beneath those waters") (emphasis in original). Federal reserved water rights exist only "to the extent needed to accomplish the purpose of the reservation." *Cappaert v. United States*, 426 U.S. 128, 138 (1976). Accordingly, this Court has approved such reservations only in situations involving a specific need to access and use nonfederal waters for a particular purpose. *Id.* at 136; *see, e.g., Arizona v. California*, 373 U.S. 546, 595-99 (1963); *Winters v. United States*, 207 U.S. 564, 575-76 (1908).

Here, NPS does not claim the need to *use* any waters in Alaska, but rather seeks the power to exercise pervasive control over them for amorphous "conservation" purposes that may not be related at all to water use. Resp. 33. This claim stretches the doctrine of reserved water rights beyond its breaking point. NPS has not established that "without the water the purposes of the reservation would be *entirely defeated*." *United States v. New Mexico*, 438 U.S. 696, 700 (1978). That is because there is no claim of water scarcity within ANILCA's CSUs. *Katie John v. United States ("Katie John III")*, 720 F.3d 1214, 1238 (9th Cir. 2013) ("[T]here is no suggestion that any federal reservation along any Alaskan waters risks being turned into a 'barren waste' as in *Winters*, or as a substantially diminished pool, as in *Cappaert*."). Nor does NPS even

attempt to connect such a rationale to the regulation of hovercraft. *Supra* at 11.

NPS's generic conservation purposes are just too broad to form the basis for a specified reserved water right. In *Cappaert*, for example, the proclamation adding Devil's Hole to Death Valley National Monument authorized NPS to manage the Monument. 426 U.S. at 140-41. This Court noted that the Organic Act provided "the 'fundamental purpose of the said parks monuments, and reservations' is 'to conserve the scenery and the natural and historic objects and the wild life therein.'" *Id* (citation omitted). But the Court hastened to add that the implied reservation did not stem from this broad purpose; rather, the reservation was limited to the water necessary to fulfill the specific purpose of the Devil's Hole reservation. *Id.* at 141. The Court therefore reviewed the relevant proclamation, which noted the "outstanding scientific importance" of a pool within Devil's Hole, and determined that "the purpose of reserving Devil's Hole Monument is preservation of the pool." *Id.* Notably, despite its finding that pool preservation was paramount, the Court did not forbid *all* uses of the pool; the Court held that "the level of the pool may be permitted to drop" so long as it remained able to sustain its unique and scientifically valuable fish population. *Id.*

In other words, the specific purpose of the narrowly-defined reservation controlled, not the broad unspecified "conservation" purposes behind creation of the National Park System. Where reservation of water is not necessary to fulfill the primary purpose of the federal reservation, the United States must acquire the water from the State—even if controlling the water would be "beneficial in the administration and public use of the national parks and

monuments." *New Mexico*, 438 U.S. at 702-03. Congress has appropriated NPS funds for such purposes, *id.* (citing 16 U.S.C. § 17j-2), and has specifically authorized NPS to purchase State-owned lands under ANILCA. Again, such statutory authorizations would be unnecessary if the "conservation" purposes behind reservations of parkland were sufficient to trigger federal reserved water rights. *Supra* at 4, 17.

Finally, NPS seeks to leverage the Ninth Circuit's *Katie John* decisions in support of its atextual interpretation of ANILCA. Resp. 34-35. Aside from the fact that those decisions are not binding on this Court, they provide no support for the conclusion that NPS may assert plenary authority over Alaska navigable waters under the banner of reserved water rights. In fact, the Ninth Circuit—in the same ruling upon which NPS principally relies—disavowed any interpretation of the statute that would grant NPS the power it seeks here and concluded that any reserved water rights under ANILCA must be limited to subsistence issues. *Alaska v. Babbitt ("Katie John I")*, 72 F.3d 698, 704 (9th Cir. 1995).

Accordingly, the Court need not disturb the *Katie John* line of cases to reject NPS's argument. Regardless of whether it has merit, the Ninth Circuit's *Katie John* rationale was borne of a belief that the subsistence context of those cases gave the court's ultimate conclusion some minimal foothold in the statute. The subsistence provisions, which occupy Title VIII of ANILCA, address that concern in a manner that is far more specific than the amorphous conservation interest NPS relies on here. In particular, Title VIII has its own preamble and is the only section of ANILCA in which Congress invoked its authority under the Commerce and Property Clauses. 16 U.S.C. § 3111(4).

At the end of the day, the Ninth Circuit's approach was, admittedly, "a problematic solution to a complex problem" involving "rural subsistence priority under ANILCA." *Katie John III*, 720 F.3d at 1245. But it provides no basis to extend the reserved water rights doctrine across the rest of ANILCA—or to the many other federal laws that employ the same definition of "public land." Nothing in the *Katie John* line suggests that NPS is entitled to assert sweeping control over navigable waters in CSUs in contravention of Section 103(c).

CONCLUSION

The Court should reverse the decision of the Ninth Circuit.

Respectfully submitted,

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No. 14-1209

IN THE

Supreme Court of the United States

JOHN STURGEON,

Petitioner,

v.

BERT FROST, IN HIS OFFICIAL CAPACITY AS ALASKA REGIONAL DIRECTOR OF THE NATIONAL PARK SERVICE, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF AMICI	1
SUMMARY OF ARGUMENT	6
ARGUMENT	8
I. CONGRESS PROPERLY AUTHORIZED THE NATIONAL PARK SERVICE TO REGULATE NAVIGABLE WATERS WITHIN ALASKA CONSERVATION SYSTEM UNITS	8
A. Congress Validly Exercised Its Broad Power To Regulate Navigable Waters	8
B. Section 103 of ANILCA Does Not Remove Rivers from Park Service Jurisdiction	13
II. IF THE COURT DISAGREES WITH THE COURT OF APPEALS' INTERPRETATION OF SECTION 103(C) AND WITH AMICI'S NARROWER CONSTRUCTION, THE CASE SHOULD BE REMANDED TO ASSESS WHETHER THE HOVERCRAFT REGULATION CAN BE UPHELD BASED UPON THE FEDERAL GOVERNMENT'S RESERVED WATER RIGHTS	16
CONCLUSION	19

TABLE OF AUTHORITIES

CASES Page

Alaska v. *Babbitt*, 72 F.3d 698 (9th Cir. 1995), *adhered to sub nom. John* v. *United States*, 247 F.3d 1032 (9th Cir. 2001) 4
Alaska v. *United States*, 545 U.S. 75 (2005) 11
Arizona v. *California*, 373 U.S. 546 (1963) . 10, 11
Bob Jones Univ. v. *United States*, 461 U.S. 574 (1983) 17
Cappaert v. *United States*, 426 U.S. 128 (1976) 10
John v. *Alaska*, No. A85-698-CV (D. Alaska Jan. 19, 1990) 3
John v. *United States*, 720 F.3d 1214 (9th Cir. 2013), *cert. denied sub nom. Alaska* v. *Jewell*, 134 S. Ct. 1759 (2014) 4, 16
King v. *Burwell*, 135 S. Ct. 2480 (2015) 14, 15
Kleppe v. *New Mexico*, 426 U.S. 529 (1976).. 9
PPL Montana, LLC v. *Montana*, 132 S. Ct. 1215 (2012) 12
Tex. Dep't of Hous. & Cmty. Affairs v. *Inclusive Cmties. Project, Inc.*, 135 S. Ct. 2507 (2015) 17
United States v. *Alexander*, 938 F.2d 942 (9th Cir. 1991) 2
United States v. *Appalachian Power Co.*, 311 U.S. 377 (1940), *superseded by statute on other grounds*, Federal Water Pollution Control Act, Pub. L. No. 92-500, 86 Stat. 816 (1972), *as recognized in Rapanos* v. *United States*, 547 U.S. 715 (2006) 12
United States v. *Chandler-Dunbar Co.*, 229 U.S. 53 (1913) 9

TABLE OF AUTHORITIES – continued

	Page
United States v. *Rands*, 389 U.S. 121 (1967)	11
United States v. *Twin City Power Co.*, 350 U.S. 222 (1956)	9
Utah Div. of State Lands v. *United States*, 482 U.S. 193 (1987)	9

STATUTES AND REGULATIONS

U.S. Const. art. I, 8, cl. 3	9
IV, 3, cl. 2	9
1958 Statehood Act, Pub. L. No. 85-508, 72 Stat. 339 (1958)	2
Pub. L. No. 104-208, 110 Stat 3009 (1996)	17
16 U.S.C. 410hh(10)	7, 14
3102	17, 18
3103(c)	13
3111-3126	2
3111(1)	3
3113	1
3114	3
3115	4, 17
3207	13
43 U.S.C. 1311(a)	10
1314(a)	13
1601-1629h	3
54 U.S.C. 100751	9
36 C.F.R. 2.17(e)	6, 8
61 Fed. Reg. 15014 (Apr. 4, 1996)	17
64 Fed. Reg. 1276 (Jan. 8, 1999)	16

LEGISLATIVE HISTORY

H.R. Rep. No. 92-746 (1971) (Conf. Rep.)	3

TABLE OF AUTHORITIES – continued

SCHOLARLY AUTHORITIES Page

David S. Case & David A. Voluck, *Alaska Natives and American Laws* (3d ed. 2012) 3

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Cohen's Handbook of Federal Indian Law (Neil Jessup Newton ed., 2012) 2

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A. Dan Tarlock, *Law of Water Rights and Resources* (2011) 9

Thompson, Leshy & Abrams, *Legal Control of Water Resources* (5th ed. 2013) 12

INTEREST OF AMICI[1]

Amici are federally recognized Alaska tribes, inter-tribal organizations and an individual Alaska Native who support federal jurisdiction to regulate navigable waters in conservation system units to protect the subsistence fishing way of life upon which rural Alaska Native people vitally depend.[2] "Subsistence uses" are defined as "the customary and traditional uses by rural Alaska residents of wild, renewable resources" of which fish are the most significant use. 16 U.S.C. 3113. "Approximately 40 million pounds of fish and wildlife are harvested annually by subsistence users, of which fish account for 60 percent." *Environmental Assessment, Modification of the Federal Subsistence Fisheries Management Program*, ch. III-1 (June 2, 1997), http://www.doi.gov/subsistence/library/ea/upload/EAModFSFMP.PDF.

Petitioner's arguments disclaim any intent to displace federal protection and management of subsistence fishing on rivers within federal conservation system units. But the sweeping nature of his (and his amici's) legal theories would directly jeopardize protective federal regulations which have been in place since 1999. Over the past 20 years, Amici tribes and tribal organizations have directly litigated or otherwise supported efforts to secure their federally-protected subsistence fishing rights on

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[1] The parties in this case have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no person or entity other than the amici made a monetary contribution to the preparation or submission of this brief.

[2] Amici are Mentasta Traditional Council, Village of Dot Lake, Tanana Chiefs Conference, Kenaitze Indian Tribe, The Organized Village of Saxman, Chugachmiut, and Nora John.

navigable waters in Alaska. While Amici agree that the Ninth Circuit's decision raises unnecessary issues regarding the regulation of Alaskan uplands, Amici support the judgment below because, without federal regulation of navigable waters within conservation system units (CSUs), the fishing rights Congress expressly protected in Title VIII of the Alaska National Interest Lands Conservation Act (ANILCA), 16 U.S.C. 3111-3126, would become a nullity; and "[i]f their right to fish is destroyed, so too is their traditional way of life." *United States* v. *Alexander*, 938 F.2d 942, 945 (9th Cir. 1991) (Kozinski, J.).

Federal regulation of navigable waters under ANILCA is critical to protecting Native subsistence fishing rights. Congress conditioned statehood on Alaska's agreement not to interfere with Alaska Native aboriginal hunting and fishing rights. 1958 Statehood Act, Pub. L. No. 85-508, 4, 72 Stat. 339, 339 (1958) (providing the "State and its people do agree . . . [and] forever disclaim all right and title . . . to any lands or other property (including fishing rights)" belonging to Alaska Natives, authority over which "shall be and remain under the absolute jurisdiction and control of the United States"); see generally *Cohen's Handbook of Federal Indian law* 4.07[3][b][i] (Neil Jessup Newton ed., 2012). Recognizing that subsistence hunting and fishing are essential to the continued physical, economic, traditional and cultural existence of Alaska Natives, Congress had long provided statutory protections for those uses of fish and wildlife. See generally *id.* 4.07[3][c][i].

Following statehood and the transfer of responsibility for managing fish and game from the federal government to the State of Alaska, regulatory restrictions on Native subsistence harvests

proliferated. Regulatory bodies strongly influenced by the views of urban sport and commercial interests imposed these restrictions. David S. Case & David A. Voluck, *Alaska Natives and American Laws* 294-95 (3d ed. 2012) ("Case & Voluck"). For instance, many traditional upriver subsistence fisheries along the Copper River were shut down shortly after statehood in favor of downriver commercial fisheries. See *John* v. *Alaska*, No. A85-698-CV, slip op. at 2 (D. Alaska Jan. 19, 1990) (Order on Cross Motions for Summary Judgment). The Alaska Native Claims Settlement Act, 43 U.S.C. 1601-1629h (ANSCA), failed to solve this problem, despite congressional expectations to the contrary. See H.R. Rep. No. 92-746 (1971) (Conf. Rep.) (expressing expectation that "the Secretary and the State [would] take any action necessary to protect the subsistence needs of the Natives"). "Some nine years [after ANCSA] it was compellingly clear that neither the state nor the Secretary were likely to protect subsistence in the manner Congress had contemplated." Case & Voluck, *supra*, at 292. Urban and sporting interests continued to dominate state management of fish and wildlife, and state agencies remained unwilling to protect Native subsistence uses. *Id.* at 294-95.

Title VIII of ANILCA was crafted to end this situation. Congress prefaced Title VIII with a declaration that "the continuation of the opportunity for subsistence uses by rural residents of Alaska . . . is essential to Native physical, economic, traditional, and cultural existence." 16 U.S.C. 3111(1). Title VIII provides that "the taking on public lands of *fish* and wildlife for nonwasteful subsistence uses shall be accorded priority over the taking on such lands of fish and wildlife for other purposes." 16 U.S.C. 3114 (emphasis added). The statute directs the Secretary

of the Interior to establish an administrative structure necessary to implement the statute. 16 U.S.C. 3115(a)–(c).

This subsistence management regime was originally conceived to operate within the framework of cooperative federalism. "Pursuant to 805(d) of ANILCA, 16 U.S.C. § 3115(d), Congress gave the state authority to implement the rural subsistence preference by enacting laws of general applicability consistent with ANILCA's operative provisions," and the State initially did so. *Alaska* v. *Babbitt*, 72 F.3d 698, 700-01 (9th Cir. 1995), *adhered to sub nom. John* v. *United States*, 247 F.3d 1032 (9th Cir. 2001). But "Congress could not have anticipated the next chain of events. In 1989, the Alaska Supreme Court struck down the state act granting the rural subsistence preference as contrary to the Alaska state constitution. *McDowell v. Alaska*, 785 P.2d 1 (Alaska 1989)." *Id.* After the Alaska legislature failed to take curative steps, "[i]n 1990, the federal government withdrew Alaska's certification and took over implementation of Title VIII." *Id.*

In the long-running "*Katie John*" litigation, the Ninth Circuit upheld the United States' determination, through notice and comment rulemaking, that certain navigable waters within CSUs are "public lands" as defined in Title VIII of ANILCA, because the United States owns federally-reserved water rights in those waters that are necessary to carry out the purposes of the CSUs. *John* v. *United States*, 720 F.3d 1214, 1224 (9th Cir. 2013), *cert. denied sub nom. Alaska* v. *Jewell*, 134 S. Ct. 1759 (2014). The Circuit thus upheld federal subsistence fishing regulations covering those waters. *Id.* Accordingly, since 1999, the federal government has managed subsistence fishing by rural residents

on roughly 60 percent of Alaska's rivers, including the Nation River. Given Alaska's inability to implement the subsistence priority, federal management over subsistence fishing rights on rivers in rural areas is essential to fulfilling Congress's manifest intent in Title VIII of ANILCA.

Two Amici, the Mentasta Traditional Council and the Village of Dot Lake, are federally recognized tribes and are the home Villages of the plaintiffs in the "*Katie John*" litigation. Nora John is Katie John's daughter and representative for the John family who seek to preserve the *Katie John* judgment. The Kenaitze Indian Tribe and the Organized Village of Saxman are federally recognized tribes that enjoy the protections that Title VIII accords its traditional subsistence hunting and fishing activities. The Tanana Chiefs Conference and Chugachmiut are non-profit inter-tribal consortia formed to serve 46 tribal villages located respectively in the Interior and Prince William Sound regions of Alaska. Most of the tribal members in these villages are both subsistence users and also shareholders in Alaska Native Corporations formed pursuant to ANCSA.

The only issue presented here concerns federal jurisdiction to enforce hovercraft regulations on navigable waters within an Alaska CSU. Amici therefore urge the Court to uphold the judgment of the Court of Appeals, but on narrow grounds that leave extraneous issues regarding the outer reaches of federal jurisdiction over Native Corporation and state lands either for administrative rulemaking or for litigation that actually involves the application of federal rules to such lands. Alternatively, the Court should remand this case to the Ninth Circuit to consider whether the hovercraft regulation should be

upheld based upon the federal government's reserved water rights in the Nation River.

SUMMARY OF ARGUMENT

This case presents a direct challenge to indisputable and historic federal authority to regulate navigable *waters* under the Commerce and Property Clauses of the Constitution. The Park Service regulation at issue, 36 C.F.R. 2.17(e), precludes the use of hovercraft on lakes and rivers in National Parks and Preserves. It was authorized in 1976 by an amendment to the Park Service's organic act. Contrary to the arguments of several of Petitioner's amici, this case does *not* involve federal regulation of Alaska Native Corporation lands within National Parks and Preserves, nor the regulation of the State of Alaska's lands. Petitioner's claims should be rejected without reaching the complex hypothetical questions presented by Petitioner and his supporting amici because those questions simply are not presented under the facts of this case. In other words, the lower court judgment can be affirmed without reaching the broad grounds asserted below, or by Petitioner's formulation of the question presented.

Section 103 of ANILCA was intended to carve out upland inholdings owned by Alaska Native Corporations and the State of Alaska from at least some Park Service regulations otherwise applicable within CSUs. But it was never intended to preclude federal regulation of navigable rivers and lakes within National Parks and Preserves. Indeed, it would be absurd to suppose Congress simultaneously passed a statute setting aside the Yukon-Charley *Rivers* National Preserve, and then wrote its legislation in a manner that barred the Park Service

from regulating uses of those very rivers to protect the purposes for which the Preserve was set aside in the first place. After all, Congress created the Preserve to "maintain the environmental integrity of the entire Charley River basin, including streams, lakes and other natural features, in its undeveloped natural condition for public benefit and scientific study; to protect habitat for, and populations of, fish and wildlife." 16 U.S.C. 410hh(10). Under Petitioner's reading of ANILCA, however, Congress established the Preserve, together with 29 other conservation areas containing navigable rivers, and yet, in an obscure subsection of a provision captioned 'Maps,' Congress intended to quietly nullify all federal regulations adopted to protect those very rivers. This Court should reject a reading of section 103 that contravenes its plain text and produces such untenable results.

Regardless of how one reads section 103, the federal reserved water rights doctrine provides an alternative basis for affirming the judgment below because (as Petitioner concedes) such rights are a federal "interest" in waters such that the Nation River is indisputably "public land" as defined in ANILCA. But because this question was never reached by the lower courts, this Court should remand to those courts for further consideration if it declines to adopt the narrow grounds set forth below as the basis for affirming the judgment below.

ARGUMENT

I. CONGRESS PROPERLY AUTHORIZED THE NATIONAL PARK SERVICE TO REGULATE NAVIGABLE WATERS WITHIN ALASKA CONSERVATION SYSTEM UNITS.

Congress indisputably enjoys the constitutional power to authorize the Park Service to regulate navigable waters of the United States within National Parks and Preserves, and did so through the 1976 amendments to the National Parks' organic act. Congress did not curtail that authority in section 103 of ANILCA, which protects Alaska Native Corporation and State inholdings from at least some Park Service regulations within CSUs in Alaska. Amici do not address the question whether general Park Service regulations, as opposed to Alaska-specific regulations, are applicable to Native Corporation and State lands within CSU units because resolution of that question is not necessary to affirm the judgment below. Indeed, that question is not properly presented in the first place, because this case strictly concerns the application of a federal regulation *to waters*, not to lands.

A. Congress Validly Exercised Its Broad Power To Regulate Navigable Waters.

No party disputes the Nation River's status as a navigable river for purposes of federal law. Petitioner challenges a Park Service regulation that states "[t]he operation or use of hovercraft [in National Parks] is prohibited." 36 C.F.R. 2.17(e). Congress authorized that regulation in 1976, when it provided that "[t]he Secretary, under such terms and conditions as the Secretary considers advisable, may prescribe regulations . . . concerning boating and other activities on or relating to water located within

System units, including *water subject to the jurisdiction of the United States.*" 54 U.S.C. 100751 (emphasis added). Because Congress's powers over navigable waters under the Commerce Clause, U.S. Const. art. I, 8, cl. 3, and the Property Clause, U.S. Const. art. IV, 3, cl. 2, are extremely broad, there is no doubt that federal authority to regulate extends to navigable waters within National Parks and Preserves. See *Kleppe* v. *New Mexico*, 426 U.S. 529 (1976); A. Dan Tarlock, *Law of Water Rights and Resources* 9.6 (2015) ("Federal jurisdiction over waters now extends to all activities subject to the full Commerce Clause.").

Contrary to Petitioner's view (Pet. Br. at 36), navigable waters within the Yukon-Charley Rivers National Preserve are not "owned" by the State, and were never "conveyed" to the State. To be sure, the State owns the submerged lands pursuant to the equal footing doctrine. *Utah Div. of State Lands* v. *United States*, 482 U.S. 193, 196 (1987) ("Because all subsequently admitted States enter the Union on an 'equal footing' with the original 13 States, they too hold title to the land under navigable waters within their boundaries upon entry into the Union."). But the actual water is not owned by any private or governmental entity. *United States* v. *Chandler-Dunbar Water Power Co.*, 229 U.S. 53, 69 (1913) ("Ownership of a private stream wholly upon the lands of an individual is conceivable; but that the running water in a great navigable stream is capable of private ownership is inconceivable."). See also *United States* v. *Twin City Power Co.*, 350 U.S. 222, 226 (1956) (federal navigational servitude can preempt any use rights granted by a State to a private party, so that compensation under the Fifth Amendment is not required for taking such interests).

The fact that the States do not "own" the water column is illustrated by the federal reserved water rights doctrine. Federal reserved rights to waters are established "when the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, [and] the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation." *Cappaert* v. *United States*, 426 U.S. 128, 138 (1976). In *Arizona* v. *California*, 373 U.S. 546, 597-98 (1963), this Court rejected the state ownership theory of navigable waters when it concluded that even after statehood there is no "doubt about the power of the United States under [the Commerce Clause and Property Clause] to reserve water rights for its reservations and its property."

Nor does the Submerged Lands Act (SLA) insulate navigable waters from federal regulation, or eliminate federal interests in those waters. Pet. Br. at 36. Congress enacted the SLA in 1953 to reverse several decisions of this Court holding that the United States, and not the States, held title to the marginal sea. "In the wake of the U.S. Supreme Court's decision in *United States v. California*, Congress . . . 'correct[ed]' the Court's holding by 'returning' the first three miles of ocean submerged lands to the coastal States." Robin Kundis Craig, *Treating Offshore Submerged Lands As Public Lands: A Historical Perspective*, 34 Pub. Land & Resources L. Rev. 51, 69-70 (2013) (footnotes omitted). The language of the SLA bears out Congress's recognition of state ownership of submerged lands, but not of any water. Compare 43 U.S.C. 1311(a)(1) (confirming title and ownership of submerged lands), with 43 U.S.C. 1311(a)(2) (confirming state rights to regulate land

and water related resources). As demonstrated by the language of the statute and *Arizona* v. *California*, 373 U.S. 546, states do not "own" the water column by virtue of having regulatory authority (unless preempted by federal law) over use of the waters. See U.S. Br. at 27-29.

As Justice Scalia explained in a case involving a National Park in Alaska, state ownership of submerged lands has little effect on federal authority to regulate activities in navigable waters.

> If title to submerged lands passed to Alaska, the Federal Government would still retain significant authority to regulate activities in the waters of Glacier Bay by virtue of its dominant navigational servitude, other aspects of the Commerce Clause, and even the treaty power. See, e.g., 43 U.S.C. § 1314(a) (under the Submerged Lands Act, the United States retains "powers of regulation and control of ... navigable waters for the constitutional purposes of commerce [and] navigation"); * * *United States* v. *California*, 436 U.S. 32, 41, and n. 18, 98 S.Ct. 1662, 56 L.Ed.2d 94 (1978) (noting that the United States retained "its navigational servitude" even when California took the "proprietary and administrative interests" in submerged lands surrounding islands in a national monument); * * * It is thus unsurprising that States own submerged lands in other federal water parks, such as the California Coastal National Monument and the Boundary Waters Canoe Area in Minnesota.

Alaska v. *United States*, 545 U.S. 75, 116-18 (2005) (Scalia, J., concurring in part and dissenting in part). See also *United States* v. *Rands*, 389 U.S. 121, 127 (1967) (concluding that the SLA "left congressional

power over commerce . . . precisely where it found [it]").

The Park Service regulation at issue here is a classic example of the exercise of federal power over the use of navigable waters. Congress authorized the Park Service to set the terms for the use of navigable waterways by private citizens and others in National Parks and refuges. Such regulation is the bread and butter of the federal commerce power over navigable waters. *United States* v. *Appalachian Elec. Power Co.*, 311 U.S. 377, 426-27 (1940) ("The point is that navigable waters are subject to national planning and control in the broad regulation of commerce granted the Federal Government."). By their very nature, navigable waters are instruments of commerce subject to federal regulations related to their use.

In sum, a State may have authority to regulate water use within its boundaries if not preempted by federal law, but that "power" is not ownership. See Thompson, Leshy & Abrams, *Legal Control of Water Resources* 588 (5th ed. 2013) ("[T]he most distinctive legal feature of water is its status as a public resource that cannot be privatized in the ordinary way."). And as this Court has noted, whatever the extent of the State's power, it is subject to "the paramount power of the United States to control such waters for purposes of navigation in interstate and foreign commerce." *PPL Montana, LLC* v. *Montana*, 132 S. Ct. 1215, 1228 (2012). Thus, the Nation River itself is not private property, nor is it owned by the State of Alaska. It remains fully subject to Congress's constitutional authority over navigable waters, and as explained in the next section, nothing in section 103 of ANILCA discloses any congressional intent to relinquish that authority.

B. Section 103 of ANILCA Does Not Remove Rivers from Park Service Jurisdiction.

No statute, including ANILCA, limits the authority of the federal government to regulate waters within National Parks and Preserves. See 16 U.S.C. 3207 ("Nothing in this Act shall be construed ... as superseding, modifying, or repealing, except as specifically set forth in this Act, existing laws applicable to the various Federal agencies which are authorized to ... exercise licensing or regulatory functions in relation thereto."). See also 43 U.S.C. 1314(a) (under the SLA, the United States retains "powers of regulation and control of . . navigable waters for the constitutional purposes of commerce [and] navigation").

Petitioner and his amici argue that the first sentence of section 103(c) precludes applying the statute and regulation to the waters here in question – by providing that "only those lands .. which are public lands ... shall be deemed to be included as a portion of such unit." 16 U.S.C. 3103(c). Ignoring the purpose of the section, they say the next sentence gives meaning to the first by explicitly exempting Alaska Native Corporation lands and State lands from the Units: "No lands which, before, on, or after [December 2, 1980], are conveyed to the State, to any Native Corporation, or to any private party shall be subject to the regulations applicable solely to public lands within such units." *Id.* But as explained above, the navigable waters of the Nation River have never been "conveyed to" the State, let alone to a Native Corporation or private party. While the State holds title to the submerged lands beneath the River, title was never conveyed to the water column; those waters remain part of the National

Parks and Preserves in Alaska and the United States retains its constitutional authority over that water.

As Petitioner acknowledges, Congress enacted section 103(c) to protect State and Native Corporation *lands* from some federal regulation, not to exempt entire federal water bodies from federal regulation. Pet. Br. at 7. If the navigable waters within the Yukon-Charley Rivers National Preserve were deemed immune from such regulation, a primary purpose of establishing the Park and Preserve would be defeated. Congress set the Preserve aside in the following terms.

> The preserve shall be managed for the following purposes, among others: *To maintain the environmental integrity of the entire Charley River basin, including streams, lakes* and other natural features, in its undeveloped natural condition for public benefit and scientific study; to protect habitat for, and populations of, fish and wildlife . . .

16 U.S.C. 410hh(10) (emphasis added). It would be absurd to read ANILCA as setting aside for permanent protection an entire river basin to be managed by the Park Service, and then to deny the agency any authority to protect the river.

It is particularly inconceivable that Congress would establish a National *Rivers* Preserve in one section of ANILCA, and then (tucked into a section dealing with maps) exclude that very river from inclusion in the unit. As this Court reiterated just last term, statutes must be construed as a whole, and isolated sections must be considered in their context, with an eye toward accomplishing the broad objectives of the statute. *King* v. *Burwell*, 135 S. Ct. 2480, 2489 (2015). "[W]hen deciding whether the language is

plain, we must read the words 'in their context and with a view to their place in the overall statutory scheme.'" *Id.* (quoting *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000)). The Court's "duty, after all, is 'to construe statutes, not isolated provisions.'" *Id.* (quoting *Graham Cty. Soil & Water Conservation Dist.* v. *United States ex rel. Wilson*, 559 U.S. 280, 290 (2010)).

Regulations concerning navigable rivers do not affect Native Corporation lands (which of course are not "public lands" under section 102 of ANILCA). The regulation of hovercraft on navigable waters likewise does not implicate state property interests in submerged lands. In short, the Park Service regulation at issue here does not touch any of the areas within Preserve boundaries that are protected from some or all Park Service regulation by section 103(c)'s carve-out for non-federal inholdings. This is the most sensible reading of the statute because it preserves the status of Nation River as a part of the CSU that was expressly created for the river's protection, while recognizing that section 103 carves out for special protection State and Native Corporation lands. The judgment below can therefore be affirmed without ever reaching how to construe section 103 in circumstances, unlike those presented here, where that section actually applies.

II. IF THE COURT DISAGREES WITH THE COURT OF APPEALS' INTERPRETATION OF SECTION 103(C) AND WITH AMICI'S NARROWER CONSTRUCTION, THE CASE SHOULD BE REMANDED TO ASSESS WHETHER THE HOVERCRAFT REGULATION CAN BE UPHELD BASED UPON THE FEDERAL GOVERNMENT'S RESERVED WATER RIGHTS.

In the event this Court disagrees with the Court of Appeals' interpretation of section 103 and with Amici's alternative argument, the judgment below should be vacated and the matter remanded for an assessment of the Secretary's authority to enforce hovercraft regulations on navigable waters of the United States in which the government owns reserved water rights.

The *Katie John* ruling upheld a comprehensive 1999 federal rule in which the government asserted reserved water rights in rivers within and adjacent to each conservation system unit in Alaska. *John*, 720 F.3d at 1229. In its Rule identifying which waters are public lands due to the reserved water rights doctrine, the federal government included the waters of the Yukon-Charley Rivers National Preserve, including the Nation River. See 64 Fed. Reg. 1276, 1286-87 (Jan. 8, 1999) (codified at 36 C.F.R. 242.3(c)(28)). The administrative record contains the specific findings underlying the Secretaries' legal determinations. *Issue Paper and Recommendations of the Alaska Policy Group* 5 & app. 4 (June 15, 1995). That document identifies each class of "conservation system units" under ANILCA and the legislation

relied upon to support the Secretaries' determination that federal reserved water rights exist.[3]

For the past 16 years the Secretaries of Interior and Agriculture have administered the ANILCA Title VIII federal subsistence priority for Amici and other rural residents on waters within and adjacent to CSUs. Petitioner agrees that the Nation River is "public land" under the foregoing precedents, but asserts this is only the case for purposes of Title VIII of ANILCA. Pet. Br. at 38. Petitioner's amici likewise agree with the *Katie John* rulings. *See* Br. of United States Senators Sullivan and Murkowski and Representative Young as Amicus Curiae in Support of Petitioner Sturgeon at 3 n.4 ("Amici are not asking this Court to overturn or revisit the Ninth Circuit's "Katie John" decisions."); Br. of Doyon, Ltd., *et al.*, at 32-35 (same); Br. of State of Alaska at 13-14 n.4 (*Katie John* rule not implicated in this case). Given

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[3] Congress expressly acquiesced in the federal agencies' regulations. After the Secretaries issued a 1996 Advance Notice of Proposed Rulemaking announcing their intent to develop subsistence fishing regulations based upon the government's ownership of reserved waters in the Alaska CSUs, *see* 61 Fed. Reg. 15014 (Apr. 4, 1996), Congress imposed a series of moratoria on the effective date of the proposed rules. Congress did so to give Alaska time and incentive to amend its laws and thus regain authority to manage subsistence uses on all lands and waters in Alaska, as originally anticipated by 16 U.S.C. 1315(d). *See, e.g.*, Pub. L. No. 104-208, § 317, 110 Stat 3009, 3009-222 (1996). After the State repeatedly failed to act, in late 1999 Congress permitted the rules to take effect. *See* 16 U.S.C. 3102 (historical note); *Tex. Dep't of Hous. & Cmty. Affairs* v. *Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2519-20 (2015) (congressional awareness of uniform interpretation of statute is proof of ratification of interpretation); *Bob Jones Univ.* v. *United States*, 461 U.S. 574, 600-01 (1983) ("It is hardly conceivable that Congress—and in this setting, any Member of Congress—was not abundantly aware of what was going on.").

ANILCA's structure, it is difficult to conceive how the Court of Appeals' prior interpretation of Title I's definition of "public lands" would not apply equally to all titles of ANILCA. After all, the opening sentence to ANILCA's definitional section declares that, but for Titles IX and XIV, ANILCA's Title I definitions apply to the entire Act. 16 U.S.C. 1302. See U.S. Br. at 31-32. Nonetheless, this is an issue which neither the Court of Appeals nor the District Court below had any opportunity to consider.

Amici therefore respectfully suggest that in the event this Court disagrees with both the argument made in section I of this Brief regarding navigable waters, and the Court of Appeals' interpretation of section 103(c) of ANILCA, the Court should remand this case for an assessment of whether the Secretary's hovercraft regulations nonetheless lawfully apply to Petitioner's activities *on the Nation River* as a result of the status of that river as federal "public lands" under Title I of ANILCA.

CONCLUSION

If the Court does not affirm the judgment below on the basis of the Court of Appeals' decision, it should either affirm the judgment because section 103 of ANILCA does not protect activities on navigable waters within CSUs from Park Service regulations, or remand the case for resolution of the question whether the Nation River is "public land" because of the United States' interest in the river under the reserved rights doctrine.

Respectfully submitted,

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December 23, 2015

No. 14-1209

IN THE

Supreme Court of the United States

JOHN STURGEON,

Petitioner,

v.

BERT FROST, IN HIS OFFICIAL CAPACITY AS ALASKA REGIONAL DIRECTOR OF THE NATIONAL PARK SERVICE, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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Brief Of National Parks Conservation Association, Defenders Of Wildlife, The Wilderness Society, American Rivers, Center For Biological Diversity, Sierra Club, Wilderness Watch, Denali Citizens Council, Copper Country Alliance, Alaska Quiet Rights Coalition, Northern Alaska Environmental Center, Friends Of Alaska National Wildlife Refuges, Alaska Wilderness League, In Support Of Respondents

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTRODUCTION 1

INTERESTS OF AMICI CURIAE 1

SUMMARY OF THE ARGUMENT 3

ARGUMENT 5

I. The Challenged Regulation Is Proper Under the Long-Standing Authority of the National Park Service to Regulate Navigable Waters Within Park Boundaries 5

II. ANILCA Preserves the National Park Service's Authority to Regulate Navigable Waters Overlying State-Owned Submerged Land 9

III. The National Park Service Must Have The Power to Regulate The Navigable Waters To Achieve The Purposes For Which Congress Established The Parks 18

CONCLUSION 21

MAP OF YUKON-CHARLEY RIVERS NATIONAL PRESERVE A-1

TABLE OF AUTHORITIES

Cases

Alaska v. United States, 201 F.3d 1154 (9th Cir. 2000).....1

Arizona v. California, 373 U.S. 546 (1963) 6

Cappaert v. United States, 426 U.S. 128 (1976)...4, 16

Clark v. Uebersee Finanz-Korporation, A.G., 332 U.S. 480 (1947).....9, 17

Douglas v. Seacoast Products, Inc., 431 U.S. 265 (1977).....6

First Iowa Hydro-Electric Coop. v. Fed. Power Comm'n, 328 U.S. 152 (1946) 6

John v. United States, 720 F.3d 1214 (9th Cir. 2013).....16

Kleppe v. New Mexico, 426 U.S. 529 (1976).....5

Minnesota ex rel. Alexander v. Block, 660 F.2d 1240 (8th Cir. 1981).....8

Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172 (1999).....6

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Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs, 531 U.S. 159 (2001) 6

Sturgeon v. Masica, 768 F.3d 1066 (9th Cir. 2014).....14

United States v. Alford, 274 U.S. 264 (1927).....5

United States v. Appalachian Elec. Power Co., 311 U.S. 377 (1940) 6

United States v. Armstrong, 186 F.3d 1055 (8th Cir. 1999) 8

United States v. Brown, 552 F.2d 817 (8th Cir. 1977) 8

United States v. California, 436 U.S. 32 (1978) 17

United States v. Chandler-Dunbar Water Power Co., 229 U.S. 53 (1913) 17

United States v. Hells Canyon Guide Serv., Inc., 660 F.2d 735 (9th Cir. 1981) 8

United States v. Moore, 640 F. Supp. 164 (S.D. W. Va. 1986) 8

United States v. Oregon, 295 U.S. 1 (1935) 14

United States v. Raddatz, 447 U.S. 667 (1980) 9, 15

United States v. Rands, 389 U.S. 121 (1967) 6, 16

Weinberger v. Hynson, Westcott & Dunning, Inc., 412 U.S. 609 (1973) 17

Constitutional Provisions

U.S. CONST. art. I, § 8, cl. 3 5

U.S. Const. art. IV, § 3, cl. 2 5

Statutes

16 U.S.C. § 1a-2(h) 9

16 U.S.C. § 3 9
16 U.S.C. § 410hh(1)–(4), (6)–(10) 12
16 U.S.C. § 410hh(1) 11
16 U.S.C. § 410hh(4) 12
16 U.S.C. § 410hh(6) 11
16 U.S.C. § 410hh(7)(a) 12
16 U.S.C. § 410hh(8)(a) 11
16 U.S.C. § 410hh(10) 10, 12, 13
16 U.S.C. § 410hh-1 12
16 U.S.C. § 410hh-1(1) 12
16 U.S.C. § 1274(a)(25)–(37) 15
16 U.S.C. § 1274(a)(25)–(50) 14
16 U.S.C. § 1274(a)(38)–(43) 15
16 U.S.C. § 1281(a) 15
16 U.S.C. § 1281(e) 15
16 U.S.C. § 1284(a) 15
16 U.S.C. § 1284(d) 15
16 U.S.C. § 3101(b) 4, 11
16 U.S.C. § 3102(1)–(3) 17
16 U.S.C. § 3103(c) ..... passim
16 U.S.C. § 3121(b) 10
16 U.S.C. § 3170(a) 3, 10, 16

16 U.S.C. § 3202(b) 3, 9

16 U.S.C. § 3207 ..... 3, 9, 16

16 U.S.C. §§ 5701–5727 20

43 U.S.C. § 1311(a) 7

43 U.S.C. § 1311(d) 7, 16

43 U.S.C. § 1314(a) 7

54 U.S.C. § 100101(a) 7

54 U.S.C. § 100751 9

54 U.S.C. § 100751(a) 8

54 U.S.C. § 100751(b) 3, 7, 16

Northwest Ordinance of 1787, 1 Stat. 50 (1789) 6

Regulations

36 C.F.R. § 2.17(e) 18

36 C.F.R. § 3.15(a) 18

36 C.F.R. § 13.1108 19

36 C.F.R. § 13.1108(a) 19

36 C.F.R. § 13.1108(b)–(e) 20

Other Authorities

General Regulations for Areas Administered by the National Park Service, 48 Fed. Reg. 30252 (June 30, 1983) 8, 19

H.R. REP. NO. 94-1569, *reprinted in* 1976 U.S.C.C.A.N. 4290 7

H.R. REP. NO. 96-97, Part 1 (1979) 13

Hovercraft Environment, HOVERCRAFT.ORG, www.hovercraft.org/hovercraft-environment/ (last visited Dec. 21, 2015) 18

NAT'L PARK SERV., WINTER PATROLS IN YUKON-CHARLEY RIVERS, http://www.nps.gov/yuch/learn/news/upload/YUCHWinterPatrols2-fixed.pdf 20

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INTRODUCTION[1]

At issue in this case is the authority of the National Park Service (Park Service) to regulate navigation on navigable waters within the Yukon-Charley Rivers National Preserve, a unit of the National Park System in eastern Alaska on the border of Canada. *See* Map at A1. The Yukon River extends nearly 2,400 miles from British Columbia and the Yukon Territory in Canada across the entire State of Alaska, to empty into the Bering Sea. *Ibid.* The Nation River, where petitioner seeks to use his hovercraft, is a tributary of the Yukon River that is navigable all the way to the Canadian border. *Alaska v. United States*, 201 F.3d 1154, 1158, 1164 (9th Cir. 2000).

INTERESTS OF AMICI CURIAE

Amici curiae are a diverse group of nonprofit organizations that have a substantial interest in ensuring that Alaska's Conservation System Units (CSUs) established by Congress in the Alaska National Interest Lands Conservation Act (ANILCA) are preserved and managed as mandated by Congress. *Amici* include national, regional, and local nonprofit organizations:

- The National Parks Conservation Association works to protect the National Park System;

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[1] The parties in this case have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no person or entity, other than *amici*, their members, and their counsel, made a monetary contribution to the preparation or submission of this brief.

- American Rivers seeks to protect wild rivers and restore damaged rivers;
- The Wilderness Society works to protect wilderness and America's public lands;
- Defenders of Wildlife works to protect wildlife and wildlife habitat;
- The Center for Biological Diversity seeks to protect all species from extinction;
- The Sierra Club seeks to encourage Americans to explore, enjoy, and protect the planet;
- Wilderness Watch works to defend and keep wild the nation's National Wilderness Preservation System;
- The Alaska Wilderness League seeks to preserve wild lands and waters in Alaska;
- The Alaska Quiet Rights Coalition seeks to protect and maintain natural quiet within Alaska's public lands;
- The Friends of Alaska National Wildlife Refuges works to promote the conservation of all Alaska National Wildlife Refuges;
- The Denali Citizens Council works to promote the natural integrity of Denali National Park and Preserve;
- The Copper Country Alliance seeks to protect the Copper River Basin, including the Wrangell-St. Elias National Park and Preserve; and
- The Northern Alaska Environmental Center works to protect habitats in Interior and Arctic Alaska.

Amici file this brief in support of the Park Service, to highlight for the Court the importance of the Park Service's jurisdiction over navigable waters to the continued protection of Alaska's National Parks[2] and other CSUs. *Amici* and their members have a long history of using and enjoying these places for the values Congress sought to protect when establishing these areas, and have a strong interest in their protection.

SUMMARY OF THE ARGUMENT

The issue in this case is whether ANILCA repealed the Park Service's long-standing authority to regulate navigable waters within park boundaries. It did not. The power of the Park Service to regulate navigable waters in parks rests on the Constitution and on statutes that delegate that authority. Congress has long directed the Park Service to regulate "boating and other activities on or relating to water located within System units." 54 U.S.C. § 100751(b). ANILCA itself specifically preserves pre-existing federal authority over rivers and the public lands. 16 U.S.C. §§ 3202(b), 3207. Indeed, ANILCA explicitly requires that the use of motorboats "shall be subject to reasonable regulations by the Secretary [of the Interior] to protect the natural and other values of the [CSUs]." 16 U.S.C. § 3170(a). In its very first section, ANILCA makes protection of those "natural and other values" its core purpose, *ibid*, and defines those values in great detail to include, among

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[2] Throughout the brief, either "national parks" or "parks" is used to refer to National Park System Units, including National Preserves, which are all managed by the Park Service.

other things, protection of "rivers . . to preserve wilderness resource values and related recreational opportunities . . . on freeflowing rivers." *Id.* § 3101(b).

Reading § 103(c) of ANILCA, 16 U.S.C. § 3103(c), to undo by implication what the rest of ANILCA expressly put into place—and kept in place—violates basic tenets of statutory construction. This case is not about Park Service regulation of private or state-owned inholdings, or the limits placed on Park Service authority over those inholdings by § 103(c) of ANILCA. Development will not come to a halt on the 19 million acres of non-federal land within CSUs if the regulation challenged by petitioner is upheld. Park Service restrictions on hovercraft put at issue only the agency's authority to regulate activities on navigable waters overlying state-owned submerged land within park boundaries.

Section 103(c) does not address the federal power to regulate navigable waters, a power that does not depend on ownership of the submerged land. Indeed, both the Submerged Lands Act (SLA) and ANILCA expressly reserve the federal power over navigation. Further, even if the federal power to regulate navigable waters depended on the existence of a federal property interest of some sort—and it does not—such an interest clearly exists in the federal reserved water rights the United States has retained in the waters involved in this case. *Cappaert v. United States*, 426 U.S. 128, 138 (1976).

The authority of the Park Service over navigable waters within the parks is critical to the parks fulfilling the purposes for which they were established. The Park Service regulates activities on navigable waters to accomplish those purposes.

Consideration of actual instances of regulation within specific CSUs demonstrates why that authority is essential. If the Park Service did not have regulatory authority over navigable waters within the parks, ANILCA's mandate to protect these areas would be impossible to fulfill.

ARGUMENT

I. THE CHALLENGED REGULATION IS PROPER UNDER THE LONG-STANDING AUTHORITY OF THE NATIONAL PARK SERVICE TO REGULATE NAVIGABLE WATERS WITHIN PARK BOUNDARIES

Congress has the power to regulate navigable waters within the National Park System and other federal lands pursuant to the Property Clause, U.S. CONST. art. IV, § 3, cl. 2, and the Commerce Clause, U.S. CONST. art. I, § 8, cl. 3. This authority does not depend on federal ownership of the submerged land.

Under the Property Clause, Congress has "the power to determine what are 'needful' rules 'respecting' the public lands." *Kleppe v. New Mexico*, 426 U.S. 529, 539 (1976). This power is entrusted to Congress "without limitations" and "is broad enough to reach beyond territorial limits." *Id.* at 538–39; *see also United States v. Alford*, 274 U.S. 264, 267 (1927) ("Congress may prohibit the doing of acts upon privately owned lands that imperil the publicly owned forests."). This necessarily includes the regulation of activities within park boundaries that could interfere with a park's purposes.

The Commerce Clause confers on Congress the power to regulate commerce, which this Court has found includes control of "all the navigable waters of

the United States. . . . For this purpose they are the public property of the nation . . . ." *United States v. Rands*, 389 U.S. 121, 122–23 (1967). This power is unaffected by State or private ownership of the submerged land, *id.* at 123, and is "as broad as the needs of commerce," extending beyond the regulation of navigation itself. *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 426 (1940).

The profound national interest in navigable waters was recognized as early as the Northwest Ordinance of 1787, which provided that "the navigable waters leading into the Mississippi and Saint Lawrence, and the carrying places between the same, shall be common highways, and forever free." Northwest Ordinance of 1787, 1 Stat. 50, 52 (1789) (reenactment of Ordinance by first Congress). Since then, this Court has regularly upheld federal actions on navigable waters, notwithstanding state ownership of the submerged land. Examples include the licensing of dams, *First Iowa Hydro-Electric Coop. v. Fed. Power Comm'n*, 328 U.S. 152 (1946); the regulation of fishing, *Douglas v. Seacoast Products, Inc.*, 431 U.S. 265 (1977); the recognition of Indian fishing rights, *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999); and the reservation of waters for Indian tribes, national recreation areas, and national wildlife refuges, *Arizona v. California*, 373 U.S. 546, 597–601 (1963). Management of navigable waters—irrespective of state ownership of the submerged land—is one of the oldest, most traditional, and most well-established of all federal powers. *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 172 (2001) (referring to Congress' "traditional jurisdiction" over navigable waters).

The national interest in navigation is also reflected in the Submerged Lands Act (SLA), enacted in 1953. The SLA confirmed the transfer of the river bottoms to the states but it did not pass title to the waters themselves. 43 U.S.C. § 1311(a). It explicitly provided that "nothing" in the statute "shall affect . . . any rights of the United States . . under the constitutional authority . to regulate . . . navigation." *Id.* § 1311(d); *see also id.* § 1314(a). The federal government's power to regulate navigation was unaffected by the transfer of the submerged lands to the states. This fact is fatal to petitioner's case.

The federal government's authority over navigable waters was also preserved by the Park Service's Organic Act. Congress delegated to the Park Service the authority to manage the parks "to conserve the scenery, natural and historic objects, and wild life in the System units and to provide for the enjoyment of the scenery, natural and historic objects, and wild life in such manner and by such means as will leave them unimpaired for the enjoyment of future generations." 54 U.S.C. § 100101(a). Congress directed the Park Service to promulgate regulations "concerning boating and other activities on or relating to water located within System units." 54 U.S.C. § 100751(b). The legislative history makes clear that, through this provision, Congress sought to give the Park Service the authority to regulate activities "on *any waters* within the system." H.R. REP. NO. 94-1569, at 6 (1976)

(emphasis added), *reprinted in* 1976 U.S.C.C.A.N. 4290, 4292.[3]

The regulation banning hovercraft within all National Parks was promulgated under this explicit statutory authority and under the Park Service's general authority to make regulations "necessary or proper for the use and management" of the National Park System. 54 U.S.C. § 100751(a); *see also* General Regulations for Areas Administered by the National Park Service, 48 Fed. Reg. 30252 (June 30, 1983)

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[3] Outside the context of Alaska and ANILCA, the general power of the Park Service and other federal land management agencies to regulate activities on navigable waters within federally-owned public lands has been repeatedly upheld, notwithstanding state ownership of the underlying submerged land. *United States v. Brown*, 552 F.2d 817 (8th Cir. 1977) (upholding a regulation that prohibited hunting on waters within park boundaries, even where the state owns the submerged land); *United States v. Armstrong*, 186 F.3d 1055 (8th Cir. 1999) (recognizing that Congress had authority under both the Property and Commerce Clauses to enact the statutory provision that directs the Park Service to regulate tour boat operators within Voyageurs National Park); *Minnesota ex rel. Alexander v. Block*, 660 F.2d 1240 (8th Cir. 1981) (upholding federal restrictions on the use of motorboats over state-owned submerged land in the Boundary Waters Canoe Area Wilderness of the Superior National Forest); *United States v. Hells Canyon Guide Serv., Inc.*, 660 F.2d 735 (9th Cir. 1981) (U.S. Forest Service has regulatory authority over navigable waters overlying state-owned submerged land in Hells Canyon National Recreation Area); *United States v. Moore*, 640 F. Supp. 164 (S.D. W. Va. 1986) (enjoining West Virginia from spraying pesticides within the boundaries of the New River Gorge National River without a Park Service permit, despite the State's ownership of the submerged land).

(issuing regulations pursuant to 54 U.S.C. § 100751 (formerly 16 U.S.C. §§ 1a-2(h), 3)).

II. ANILCA Preserves the National Park Service's Authority to Regulate Navigable Waters Overlying State-Owned Submerged Land

ANILCA preserves the Park Service's statutory authority under 54 U.S.C. § 100751 to regulate navigable waters within national parks in Alaska. ANILCA includes numerous provisions that indicate Congress intended the Park Service to regulate navigable waters within CSUs regardless of ownership of the submerged land. And it lacks any indication—in § 103(c) or anywhere else—that Congress intended to restrict the power of the United States with respect to the regulation of water resources. Congress would not have directed the Park Service to regulate activities on navigable waters, or established CSUs expressly to protect rivers, while at the same time revoking the agencies' authority to do so. The Court "cannot impute to Congress a purpose to paralyze with one hand what it sought to promote with the other." *United States v. Raddatz*, 447 U.S. 667, 676 n.3 (1980) (quoting *Clark v. Uebersee Finanz-Korporation, A.G.*, 332 U.S. 480, 489 (1947)).

ANILCA explicitly preserves pre-existing federal authority to regulate activities to protect the parks. Congress provided that—subject to specific exceptions—nothing in ANILCA "is intended to enlarge or diminish the responsibility and authority of the Secretary over the management of the public lands." 16 U.S.C. § 3202(b). Congress also kept in place all pre-ANILCA federal authority to regulate activities on navigable waters. *Id.* § 3207. Congress

did this to "clarif[y] that the Act does not affect the jurisdiction of the State of Alaska and the federal government as such jurisdiction relates to the appropriation, control, or development of water resources." S. REP. No. 96-413, at 175 (1979).

More specifically, ANILCA directs the Park Service and other federal agencies to regulate motorboating and other forms of transportation on rivers. *See* 16 U.S.C. § 3170(a). The requirement that federal agencies allow snowmachines, motorboats, and airplanes within CSUs for "traditional activities" and "for travel to and from villages and homesites" demonstrates that Congress intended the agencies to have regulatory authority over navigable waters. *Ibid.*[4] Another provision of ANILCA, focused on protecting the use of motorboats and other surface transportation for subsistence purposes, likewise makes those uses "subject to reasonable regulation." *Id.* § 3121(b). In short, Congress, in ANILCA, specifically directed use of the federal agencies' authority to regulate activities like motorboating to "protect the natural and other values" of the CSUs. *Id.* § 3170(a).

Further, Congress established many of the CSUs specifically to protect rivers and the values associated

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[4] Accordingly, the argument made by the Safari Club that float plane access will be barred by the Ninth Circuit's ruling is baseless. Br. of *Amicus Curiae* Safari Club International In Support of Pet'r 5–8. In addition to 16 U.S. C. § 3170(a), ANILCA specifically requires the Park Service to allow "aircraft to continue to land at sites in the Upper Charley River watershed" within the Preserve except when such use "would be inconsistent with the purposes of the preserve." *Id.* § 410hh(10).

with them, such as fish and wildlife, recreation, and subsistence uses. Congress emphasized, in both the statute and the legislative history, the importance to the parks of numerous rivers, and it never distinguished waters where the state owns the submerged land. Rather, Congress passed ANILCA, in part, to preserve "freeflowing rivers" and the ability to canoe and fish on those rivers. *Id.* § 3101(b).

To accomplish this, Congress established ten new Park Service units, twenty-six wild and scenic rivers, and other federal reservations in Alaska. Congress established all of the new parks to "protect these splendid lands and waters" and to provide unique recreational opportunities, "ranging from the solitude and challenge of remote wilderness to . . . rafting down a crystal clear river." S. REP. No. 96-413, at 10. Four of the ten new national parks were established—and one of the three previously-existing parks expanded—to specifically protect identified rivers. Congress designated the Aniakchak River and other lakes and streams for protection "in their natural state" within the Aniakchak National Monument. 16 U.S.C. § 410hh(1). Congress specifically included the Kobuk, Salmon, and other rivers in the Kobuk Valley National Park to "maintain the environmental integrity" of the rivers "in an undeveloped state." *Id.* § 410hh(6); S. REP. No. 96-413, at 19 (indicating Congress included the Salmon River to preserve its wild character). Likewise, Congress tasked the Park Service with maintaining "the environmental integrity of the Noatak River" in the Noatak National Preserve, assuring that it is "unimpaired by adverse human activity," 16 U.S.C. § 410hh(8)(a), and the entire Charley River basin including streams, lakes, and

other natural features, in its undeveloped natural condition in the Yukon-Charley Rivers National Preserve. *Id.* § 410hh(10). And Congress expressly expanded Glacier Bay National Monument and established Glacier Bay National Preserve to protect part of the Alsek River, *id.* § 410hh-1(1), which Congress found "has high potential for white water recreation and is a major international natural resource." S. REP. No. 96-413, at 35.

Two of the new national parks were established to protect rivers more generally. Congress established Gates of the Arctic National Park and Preserve and Lake Clark National Park and Preserve to protect the "scenic beauty" of the lakes and "wild rivers" in their "natural state." 16 U.S.C. §§ 410hh(4), 410hh(7)(a); *see also* S. REP. No. 96-413, at 19 (including the John River in Gates of the Arctic National Park because it is "critical" to protect its "natural and wilderness character"). And nine of the new national parks were established—and three expanded—specifically to protect fish and wildlife. 16 U.S.C. §§ 410hh(1)–(4), (6)–(10), 410hh-1. Congress recognized the necessity of protecting "[p]ristine watersheds" for fish habitat. S. REP. No. 96-413, at 36 (including the headwaters of the Alagnak River and Nonvianuk Lake in the additions to the Katmai National Park and Preserve). The stated purposes of these reservations necessarily require that the Park Service have the authority to regulate activities on navigable waters within the parks.

Specific to the facts of petitioner's case, ANILCA's provisions and legislative history demonstrate congressional intent that the Park Service regulate navigable waters within the Yukon-Charley Rivers National Preserve (Preserve). The Park Service

calculates that the Preserve protects 128 miles of the Yukon River and all 106 miles of the Charley River, plus the entire Charley River watershed. *See Yukon-Charley Rivers: What is Yukon Charley Rivers?*, NAT'L PARK SERV., http://www.nps.gov/yuch/what-is-yukon-charley-rivers.htm (last visited Dec. 20, 2015). Congress emphasized that the Yukon and Charley Rivers are "nationally significant," and it described the Charley as "what may be the best wild river in the state of Alaska" and "one of Alaska's best whitewater rivers." S. REP. No. 96-413, at 32–33 (noting that the Charley River is an outstanding resource that made designating the Preserve "clearly in the national interest" and that boating on the Charley River and its tributaries "will provide high quality experiences for visitors").

Congress directed the Park Service to manage the navigable waters of the Preserve to, among other things, "protect habitat for, and populations of, fish and wildlife" and to "maintain the environmental integrity of the entire Charley River basin, including streams, lakes, and other natural features, in its undeveloped natural condition." 16 U.S.C. § 410hh(10); S. REP. No. 96-413, at 33 (anticipating federal control over rivers within the boundaries of the Preserve and noting that "the National Park Service is the appropriate management agency for the area").

The Yukon and Charley Rivers and their tributaries form the heart of the Preserve, with most park activities occurring on or alongside these rivers. *See Yukon-Charley Rivers: Plan Your Visit*, NAT'L PARK SERV., http://www.nps.gov/yuch/planyourvisit/index.htm (last visited Dec. 21, 2015); *see also* H.R. REP. No. 96-97, pt. 1, at 207 (1979) ("The Yukon

River corridor [is where] . . . most of the visitor use of the preserve and wilderness is expected to occur. The Secretary should take into consideration the designation of a suitable landing location or locations within the Yukon-Charley for the purpose of public access to the river.").[5] The Nation River, where petitioner was approached by Park Service officials, lies partially within the Preserve, flowing from well beyond the Canadian border to the Yukon River.[6] *Sturgeon v. Masica*, 768 F.3d 1066, 1070 (9th Cir. 2014) ("The lower six miles of the Nation River lie within the Yukon-Charley Rivers National Preserve . . ."). To access the Nation via the Yukon, one must travel through the Preserve. *See* Map at A1.

Congress' attention in ANILCA to protecting waterways extended beyond the national parks. Congress added twenty-six rivers to the National Wild and Scenic Rivers System, directing the Secretary of the Interior to administer them. 16

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[5] The logical consequences of petitioner's contentions would be to bar the Park Service from regulating navigation on the Yukon River within the Preserve. That result would be particularly strange, given the Yukon River's 2,400 mile length, and its historic role as an avenue of commerce extending more than 700 miles into Canada. *See Yukon River*, YUKON INFO, www.yukoninfo.com/yukon-river/ (last visited Dec. 19, 2015).

[6] The Nation River's origin in Canada is relevant because under the equal footing doctrine, as implemented by the Submerged Lands Act, a state may allocate and govern the bottoms of navigable rivers according to state law, but subject to the United States' power "to control such waters for purposes of navigation in interstate and foreign commerce." *PPL Montana, LLC v. Montana*, 132 S. Ct. 1215, 1228 (2012) (quoting *United States v. Oregon*, 295 U.S. 1, 14 (1935)).

U.S.C. § 1274(a)(25)–(50). Thirteen of these designations are for rivers within National Parks, *id.* § 1274(a)(25)–(37), and six are for rivers within National Wildlife Refuges, *id.* §1274(a)(38)–(43). Under the Wild and Scenic Rivers Act, all of these rivers must be "administered . . . to protect and enhance the values which caused [them] to be included." *Id.* § 1281(a). Also, the Wild and Scenic Rivers Act specifically contemplates concurrent federal and state jurisdiction over the rivers, *id.* § 1281(e), but provides that state jurisdiction may not be exercised in a way that impairs the protection of the rivers, *id.* § 1284(d).

The Wild and Scenic Rivers Act explicitly gives federal agencies the authority to limit hunting otherwise allowed by the State "for reasons of public safety, administration, or public use and enjoyment." *Id.* § 1284(a). Under petitioner's reasoning, all of the Wild and Scenic Rivers where the State owns the submerged land would no longer be subject to these requirements. This would make ANILCA's addition of many—if not all—of the rivers to the National Wild and Scenic Rivers System meaningless by removing the Secretary of the Interior's ability to protect them as mandated by Congress. This would result in the "paralyzing hand" this Court cautioned against in *Raddatz*, 447 U.S. at 676 n.3. And if § 103(c) is held to have repealed federal authority to regulate navigable waters overlying state-owned submerged land within CSUs, it would have the incongruous result that rivers flowing within non-CSUs federal lands in Alaska where petitioner's strained reading of § 103(c) would not apply—such as in the Chugach National Forest and the unreserved land managed by the Bureau of Land

Management—would be subject to federal regulation while rivers designated under the Wild and Scenic Rivers Act would not.

Notwithstanding the centuries-old federal constitutional power to regulate navigable waters, and the explicit statutory language preserving that authority, 43 U.S.C. § 1311(d), 54 U.S.C. § 100751(b), 16 U.S.C. §§ 3170(a), 3207, petitioner contends that § 103(c) took away that power by implication. Section 103(c) never discusses the federal power to regulate navigable waters. Congress would not have directed the Park Service to protect specific rivers or directed the Park Service to regulate activities on navigable waters, while at the same time, and in the same statute, taking away all Park Service regulatory authority over those waters.

Petitioner claims Alaska's ownership of the submerged land under navigable rivers means that those waters "are not 'public lands,' [and the Park Service] may not regulate them pursuant to its general authority to manage national parks." Petr. Br. at 18. But the federal power to regulate navigable waters does not depend on who owns the bottom of a river or lake.[7] As this Court long ago stated, *Rands*,

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[7] To the extent that any property interest is required, the Government is correct, Respondent's Br. 29–33, that the United States owns federal reserved water rights (FRWRs) in some navigable waters in Alaska—both inside and outside of CSUs. *John v. United States*, 720 F.3d 1214, 1221-22 (9th Cir. 2013), *cert. denied* 134 S. Ct. 1759 (2014). This property interest arises both in the area of federal subsistence management, *ibid*, and regarding federal lands reserved for conservation purposes. *Cappaert*, 426 U.S. at 138. Were it relevant or necessary to the disposition of this case—and it is not—this fact would require

389 U.S. at 127, the transfer of submerged lands to states, "left congressional power over commerce and the dominant navigational servitude of the United States precisely where it found them." Under the SLA, Alaska got neither ownership of the navigable waters, *see United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53, 69 (1913), nor the right to exclusively regulate them. *United States v. California*, 436 U.S. 32, 41 n.18 (1978). *Amici* are not aware of a single reported decision in which the federal government's Property Clause and Commerce Clause management authority over navigable waters was held to be subordinated to, or displaced by, state ownership of the submerged land. Such a result would upend the Constitution and more than 200 years of constitutional history.

ANILCA must be read "to give the Act the most harmonious, comprehensive meaning possible." *Weinberger v. Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 631–32 (1973) (quoting *Clark*, 332 U.S. at 488). Here, that reading is that ANILCA preserves federal authority over navigable waters within CSUs, allowing application of the Park Service's prohibition of hovercraft within the parks.

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the conclusion, as the Secretaries of the Interior and Agriculture have determined, that all navigable and non-navigable waters within 34 CSUs, including Yukon-Charley Rivers National Preserve, are federal "public lands" within the meaning of ANILCA, because the FRWRs are property "interests" in the "waters." 16 U.S.C. § 3102(1)–(3) (defining "public lands" as "lands, waters, and interests therein," "the title to which is in the United States.").

III. THE NATIONAL PARK SERVICE MUST HAVE THE POWER TO REGULATE THE NAVIGABLE WATERS TO ACHIEVE THE PURPOSES FOR WHICH CONGRESS ESTABLISHED THE PARKS

Recognizing that the rivers are essential to the lands it manages and to achieving Congress' objectives for preserving those lands, the Park Service regulates activities on navigable waters overlying state-owned submerged land within the parks according to the purposes for which they were established. Examples include prohibiting hovercraft and managing visitation for particularly popular rivers to maintain the rivers' and the parks' character. The Park Service also relies on its own travel on the navigable rivers to enforce its regulations that apply park-wide.

The Park Service's prohibition of hovercraft within the parks is a necessary regulation of navigation to protect park resources and the visitor experience. In 1983, the Park Service adopted regulations that prohibit hovercraft to protect the Park System. 36 C.F.R. § 2.17(e). Personal hovercraft are generally 10–20 feet long, but can be significantly larger; some hovercraft can carry 100 people. Hovercraft are noisy, and most models are louder than the maximum noise level allowed by Park Service regulations for vessels. *See* 36 C.F.R. § 3.15(a) (vessels must operate below 75 dB(a)); *Hovercraft Environment*, HOVERCRAFT.ORG, www.hovercraft.org/hovercraft-environment/ (last visited Dec. 21, 2015) ("modern hovercraft typically reach levels of up to 80 decibels"). The Park Service prohibited hovercraft "because they provide virtually unlimited access to park areas and introduce a

mechanical mode of transportation into locations where the intrusion of motorized equipment by sight or sound is generally inappropriate." General Regulations for Areas Administered by the National Park Service, 48 Fed. Reg. at 30258. Because hovercraft travel on a cushion of air, they are not limited to waterways, as are traditional boats. *Ibid.* Rather, they can move over mudflats, wetlands, gravel bars, and mild rapids, accessing areas not generally considered navigable by motorized boats. And that is why petitioner desires to use his hovercraft within the Preserve: to reach areas that are inaccessible by other watercraft. Pet'r's Opening Br. at 14; Robin Bravender, *National Parks: Moose Hunter's Unlikely Path to the Supreme Court*, GREENWIRE, Nov. 23, 2015, www.eenews.net/stories/1060028460/ (last visited Dec. 21, 2015) (the hovercraft "allowed [Sturgeon] to travel over gravel bars and shallow areas. . . [In a jet boat, Sturgeon] can't get up the river as far as [he] normally do[es] [in the hovercraft], and some years [he] can't get up it at all.").

The Park Service also regulates specific rivers to reduce resource impacts and protect the parks. For example, the Park Service imposes strict guidelines to reduce resource impacts and retain a wilderness experience on the Alsek River in Glacier Bay National Park. *See* 36 C.F.R. § 13.1108. The Alsek is a popular and nationally-known river for week-long or longer rafting trips in remote wilderness. Park Service permits are required to float the Alsek. *Id.* § 13.1108(a). Only one trip is allowed to start each day, and the waiting list for a private permit is several years long. The Park Service limits group size and the length of time visitors can stay at popular camp

spots, and requires visitors to carry out all trash, including human waste. 36 C.F.R. § 13.1108(b)–(e). These regulations are in place to protect the park, the river, and the visitor experience.

Revoking the Park Service's authority over navigable waters would cripple the Park Service's enforcement abilities. In many parks in Alaska, the navigable rivers form the major transportation corridors, akin to roads in the parks in the contiguous United States. For example, the Yukon River in the Preserve is how the majority of visitors travel through the Preserve. *Yukon-Charley Rivers: Plan Your Visit*, NAT'L PARK SERV., http://www.nps.gov/yuch/planyourvisit/index.htm (last visited Dec. 1, 2105). Similarly, the Park Service uses the Yukon River to travel within the Preserve to enforce Park Service regulations, both on and off the river. *See, e.g.*, NAT'L PARK SERV., WINTER PATROLS IN YUKON-CHARLEY RIVERS, http://www.nps.gov/yuch/learn/news/upload/YUCHWinterPatrols2-fixed.pdf (indicating that winter patrols are centered around the Yukon River).

Other park resources and visitor experiences would be significantly impaired if the Park Service were barred from enforcing its regulations on navigable waters. The Park Service may be unable to implement seasonal closures to ensure passage of king salmon into Canada to fulfill international treaty obligations, *see* 16 U.S.C. §§ 5701–5727, to prevent the dumping of trash or fuel into the waterway, or to enforce subsistence hunting and fishing regulations when violations occur on the water. In short, without having the ability to enforce regulations on navigable waters, the Park Service could be significantly constrained in protecting parks,

especially in those parks where the majority of public use occurs on those waters.

* * *

Amici urge the Court to affirm the Court of Appeals' decision. The power of the Park Service to regulate navigable waters in parks is constitutionally based, and has been delegated and preserved by numerous statutes, including ANILCA. Reading § 103(c) of ANILCA to impliedly repeal this authority would have far-reaching consequences, significantly reducing the federal agencies' ability to protect CSUs for the purposes for which Congress set them aside. ANILCA is properly read to keep in place the Park Service's authority over navigable waters. The remainder of petitioner's arguments, regarding the reach of § 103(c)'s limitations on the regulation of inholdings, are not at issue.

CONCLUSION

For the foregoing reasons, the decision below should be affirmed.

Respectfully submitted,

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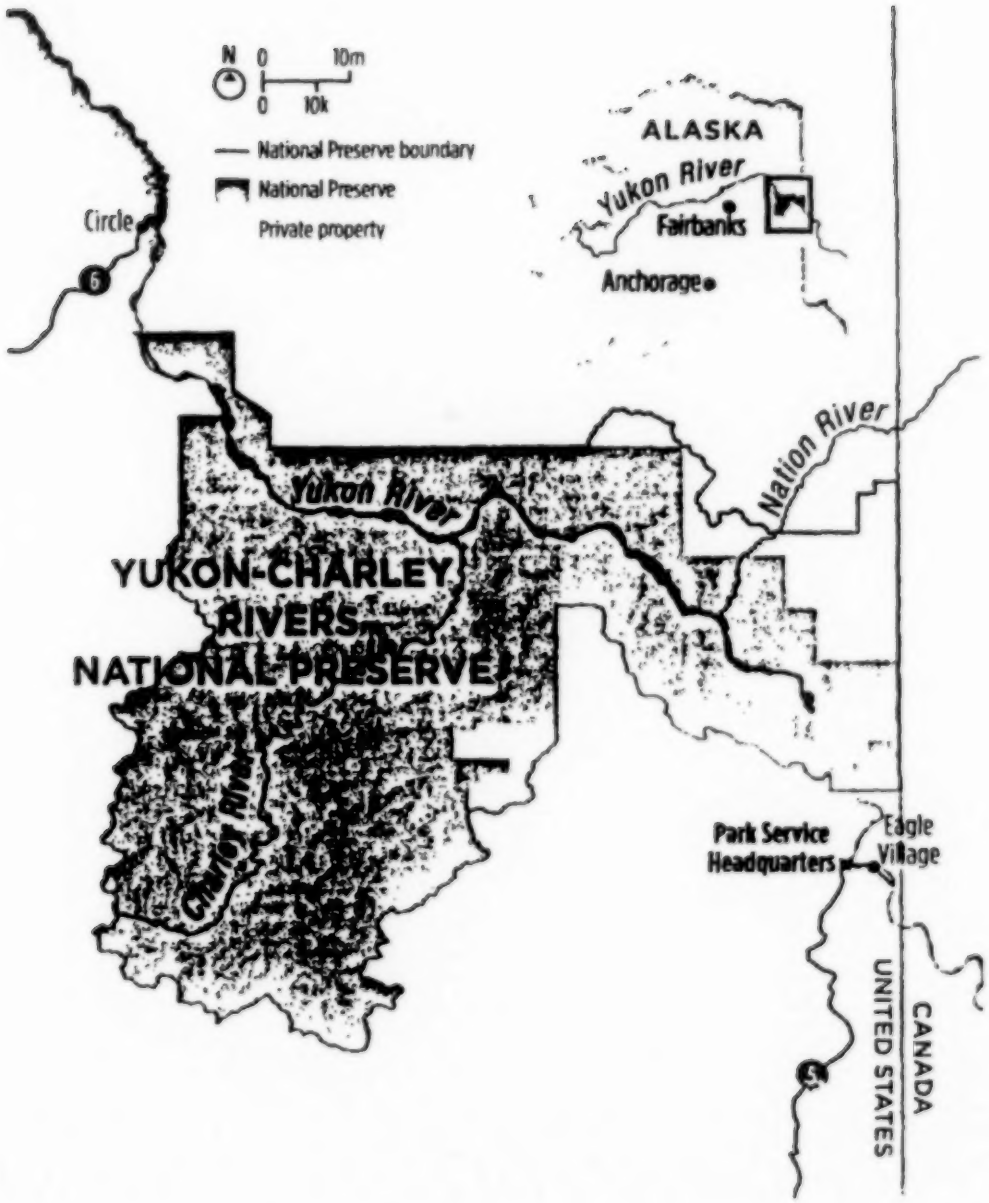
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